Supreme Court, U.S.
FILED

01-78 JUL 13 2001

OFFICE OF THE CLERK

No. 01-

IN THE

Supreme Court of the United States

KIRBY McINERNEY & SQUIRE, LLP, and
WELCH & FORBES, INC., individually and
on behalf of the class,

Petitioners,

v.

JOANNE A. ABOFF FAMILY TRUST,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

ROGER W. KIRBY
Counsel of Record
KIRBY MCINERNEY & SQUIRE, LLP
830 Third Avenue, 10th Floor
New York, NY 10022
(212) 371-6600

HENRY P. MONAGHAN
HAROLD EDGAR
435 West 116th Street
New York, NY 10027
(212) 854-2644

Attorneys for Petitioners

168071

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

Counsel for a class of securities investors applied for counsel fees in connection with an extraordinary class action settlement that secured at a minimum 100% of the aggregate class claims. No class member objected or opted out. Respondent, a class member who had not moved to intervene and had not objected to the settlement, was the solitary objector to the fee award. Under the settlement, neither respondent nor any other class member could benefit in any way from a fee reduction: the only beneficiary was the defendant, who did not appeal the fee award. Explicitly recognizing this fact, the court of appeals nonetheless rejected a "troublesome" (App. 8a) objection to its appellate jurisdiction to consider the fee award.

In characterizing itself as a "silent part[y]" in all district court class action settlement awards, a role that invested it with a "pervasive [appellate] supervisory power" on all matters relating to class counsel fees, did the court of appeals violate (a) Article III by holding, contrary to this Court's decisions and in direct conflict with *Powers v. Eichen*, 229 F.3d 1249, 1254 n.4 (9th Cir. 2000), that an appealing objector need not satisfy the "injury in fact", "causation" and "redressibility" requirements for standing, and (b) 28 U.S.C. §1291 and F.R. App. Proc. 3(c), in concluding that such an objector was a "party" for purposes of its appellate jurisdiction, even though neither the appealing objector nor his class could benefit in any way from the success of the appeal?

PARTIES TO THE PROCEEDING

The "parties" to the case below, styled *In re Cendant Corporation Prides Litigation*, are .

Joanna A. Aboff Family Trust, appellant;

Welch & Forbes, Inc., appellee;

Kirby McInerney & Squire, LLP, class counsel;

and

Cendant Corporation, Merrill Lynch & Co., Chase Securities, Inc., Henry R. Silverman, Walter A. Forbes, Cosmo Corigliano, appellees.

Pursuant to this Court's Rule 12.6, petitioners state their belief that Cendant Corporation, Merrill Lynch & Co., Chase Securities, Inc., Henry R. Silverman, Walter A. Forbes, and Cosmo Corigliano have no interest in the outcome of the petition. Cendant Corporation, which would benefit from the fee reduction, agreed not to oppose the fee application. In the court of appeals Cendant appeared to support the settlement, but it did not challenge the fee award.

STATEMENT PURSUANT TO RULE 29.6

Petitioners Welch & Forbes, Inc. and Kirby McInerney & Squire, LLP have no parent corporations and no publicly held company owns 10% or more of their stock.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

STATEMENT PURSUANT TO RULE 29.6 ii

TABLE OF CONTENTS iii

TABLE OF CITED AUTHORITIES v

TABLE OF APPENDICES ix

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

1. Litigation Below 4

2. The Settlement 5

3. The Fee Award 5

4. The Court of Appeals 6

REASONS FOR GRANTING THE WRIT 6

POINT I. THE COURT'S CONCLUSION THAT THE OBJECTOR HAD STANDING CONFLICTS WITH THIS COURT'S PRECEDENT AND IS IN DIRECT CONFLICT WITH THE NINTH CIRCUIT. 13

A. The Decision Conflicts with this Court's Precedents 13

B. The Decision Below It is In Direct Conflict with The Ninth Circuit's Decision in *Powers v. Eichen* 17

POINT II. THIS OBJECTOR IS NOT A PARTY FOR PURPOSES OF 28 U.S.C. §1291, AND F.R.APP. PROC. 3(c) 18

CONCLUSION 21

TABLE OF CITED AUTHORITIES

CASES

Altman v. Bedford Central School District,
245 F.3d 49 (2nd Cir. 2001) 8, 12

Becker v. Montgomery,
532 U.S. __, 121 S. Ct. 1801 (2001) 3, 10, 18

Bender v. Williamsport Area School District,
475 U.S. 534 (1986) 16, 19

Bennett v. Spear,
520 U.S. 154 (1997) 14

Blossom v. The Milwaukee Railroad & C.R. Co.,
68 U.S. 655 (1863) 19

In re Brand Name Prescription Drugs Antitrust Litigation,
115 F.3d 456 (7th Cir. 1997) 10

California Public Employee's Retirement System v. Felzen,
525 U.S. 315 (1999) 10

In re Cendant Corp. Litigation,
182 F.R.D. 144 (D.N.J. 1998) 4

In re Cendant Corporation Securities Litigation,
109 F. Supp. 2d 285 (D.N.J. 2000) 4

Church of Scientology of California v. United States,
506 U.S. 9 (1992) 7, 12

Deposit Guaranty National Bank, Jackson, Mississippi, v. Roper,
445 U.S. 326 (1980) 8, 9

Diamond v. Charles,
476 U.S. 54 (1986) 13, 15,16

Federal Election Com'n v. Akins,
524 U.S. 11 (1998) 14

Felzen v. Andreas,
134 F.3d 873 (1998) 10

Florida v. Thomas,
532 U.S. __, 121 S.Ct. 1905 (2001) 18

Friends of Earth, Inc. v. Laidlaw Environmental Sevices, Inc.,
528 U.S. 167 (2000) 9, 12, 13, 14, 16

Good News Club v. Milford Central School,
533 U.S. __, 121 S. Ct. 2093 (2001) 9

Iron Arrow Honor Society v. Heckler,
464 U.S. 67 (1983) 16

Kneeland v. American Loan & Trust Co.,
136 U.S. 89 (1890) 18

Lewis v. Casey,
518 U.S. 343 (1996) 14

Lewis v. Continental Bank Corp.,
494 U.S. 472 (1990) 7, 13, 16, 17

Lobatz v. U.S. West Cellular of Calif., Inc.,
222 F.3d 1142 (9th Cir. 2000) 17, 18

Lujan v. Defenders of Wildlife,
504 U.S. 555 (1992) 9, 14

Marino v. Ortiz,
484 U.S. 301 (1988) 10, 18, 19

Powers v. Eichen,
229 F.3d 1249 (9th Cir. 2000) ..... *passim*

Powers v. Ohio,
499 U.S. 400 (1991) 16

Raines v. Byrd,
521 U.S. 811 (1997) 14

Roe v. Wade,
410 U.S. 113 (1973) 7

Steel Co. v. Citizens for a Better Environment,
523 U.S. 83 (1998) 8, 13, 14

United States v. Nixon,
418 U.S. 683 (1974) 18

Vermont Agency of Natural Resources v. United States ex rel Stevens,
529 U.S. 765 (2000) ..... *passim*

Zucker v. Occidental Petroleum Corp.,
192 F.3d 1323 (1999), *cert. denied*,
529 U.S. 1066 (2000) 7, 17

STATUTES AND RULES

28 U.S.C. §1254(1) 1, 10, 18

28 U.S.C. §1291 ..... *passim*

28 U.S.C. §1331 1

U.S. Constitution, Article III ..... *passim*

F.R. App. Proc., Rule 3(c) ..... *passim*

U.S. Sup. Ct. Rule 12 ..... 10, 18

U.S. Sup. Ct. Rule 12.6 ii

U.S. Sup. Ct. Rule 14 ..... 10, 18

MISCELLANEOUS

R. Fallon, *Of Justicability, Remedies and Public Law Litigation: Notes on the Jurisprudence of Lyons*, 59 N.Y.U. L. Rev. 1, 58 (1984) 19

TABLE OF APPENDICES

March 21, 2001 Opinion of the United States Court of Appeals for the Third Circuit 1a

June 16, 1999 Opinion of the United States District Court for the District of New Jersey 48a

April 25, 2001 Order of the United States Court of Appeals for the Third Circuit 58a

PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is reprinted in the Appendix ("App.") at 1a to 47a and is officially reported at 243 F.3d 722. The opinion of the district court approving the class action settlement and awarding counsel fees is reprinted at App. 48a to 57a and is officially reported at 51 F. Supp.2d 537.

JURISDICTION

The jurisdiction of the district court was invoked under 28 U.S.C. §1331. The court of appeals asserted jurisdiction under 28 U.S.C. §1291 and entered its judgment on March 21, 2001. On April 25, 2001, the court denied a timely petition for rehearing and rehearing *en banc*. App. 58a. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article III of the Constitution of the United States restricts "the judicial power of the United States . . . (Section 1) to enumerated "Cases [and] Controversies" (Section 2). 28 U.S.C. §1291 provides in relevant part that "the court of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States. . . . " F.R. App. Proc. 3(c) provides in relevant part that "The notice of appeal must (a) specify the party or parties taking the appeal . . . ."

STATEMENT OF THE CASE

The relevant facts are few in number and undisputed. Respondent was a class member of an extraordinary class action settlement that secured at a minimum 100% of the aggregate class claims (App. 8a), with many class members obtaining recoveries in the millions of dollars. No class member, including respondent, objected to the settlement or opted out. App. 5a. Defendants' rights were protected by the district court's final and unappealed judgment, which has claim preclusive effect against all class members.

Respondent did not move to intervene in the district court and did not object to the settlement; it appeared solely - and alone - to object to the fee award. Under the terms of the settlement, no class member was required to pay fees. Counsel fees were paid from the relatively small percentage of the settlement fund left unclaimed. App. 3a-4a. Any unclaimed remainder of that fund reverted to the defendant. Thus, neither the class as a whole nor any class member, including respondent, could benefit from any reduction in counsel fees. After reducing the amount of the fees requested by 43%, the district court awarded counsel fees. App. 18a n.13.

Although recognizing that neither the respondent nor the class could benefit in any way from a reduction of the fee award on appeal, the court of appeals rejected a "troublesome" challenge to its appellate jurisdiction. App. 8a. Directly contrary to *Powers v. Eichen*, 229 F.3d 1249, 1254 n.4 (9th Cir. 2000), the court concluded that there was appellate standing under Article III, even though it did not examine the "injury in fact", "causation" and "redressibility" requirements of standing law. The court also held that the appeal was proper, under 28 U.S.C. §1291, although the court never explained how the appealing objector was a "party", as required by F.R. App. Proc. Rule 3(c), when neither the objector nor its class could

benefit from the success of the appeal. This Court characterized Rule 3(c) as jurisdictional just the other day. *Becker v. Montgomery*, 532 U.S. __, 121 S.Ct. 1801, 1807 (2001).

The court of appeals simply said that the person "aggrieved" requirement must be read "broadly" (App. 8a), and held that by virtue of "the special position of the courts in connection with class action settlements and [ ] fee awards" (App. 12a) it had an "independent interest in . . . [class action] fee awards" (App. 8a), and thus the court had jurisdiction to entertain the appeal. It said the courts of appeals are "in effect third parties to the fee award process, albeit silent parties for the most part until the award is finalized and reviewed." App. 8a-9a. It added:

> Nor is our responsibility in connection with class action matters restricted to reviewing the final fee determination made by the District Court. Our interest and supervisory role is pervasive and extends not only to the final fee award but also to the manner by which class counsel is selected and the manner by which attorneys' fee conditions are established. App. 15a.

In effect, the court of appeals invested itself with a free-standing, roving judicial "ombudsman" or "cop" role in class actions, a role wholly unrestrained by Article III or §1291. And in its newly fashioned role as a silent partner in all class action settlements, the court of appeals invited into its court room anyone interested in drawing the court's "attention" to any aspect of the class action proceedings below without regard to whether the invitee or any class member stood to benefit in any way from the court's ruling. App. 45a.

For purposes of this petition, the relevant facts have just been described. They are not in dispute. What follows is a brief description designed to put more flesh and blood on the petition.

1. Litigation Below. In February 1998, defendant Cendant Corporation, through a wholly owned subsidiary, issued a derivative-type convertible security known as Cendant FELINE PRIDES ("Prides") in an initial public offering ("Prides offering"). Two months later, Cendant announced the discovery of accounting irregularities in one of the merged entities, which meant that Cendant's financial statements for 1997, and possibly earlier years, would be restated. Following a precipitous decline in the value of the Prides, a number of Prides purchasers as well as purchasers of other Cendant securities filed class actions against Cendant and others. Initially, the district court in New Jersey consolidated all of the actions. Thereafter, petitioners filed another class action solely on behalf of Prides purchasers, and the court appointed petitioner Welch & Forbes, Inc. lead plaintiff for all such claims. See *In re Cendant Corp. Litig.*, 182 F.R.D. 144 (D.N.J. 1998).

On October 8, 1998, pursuant to an auction process (from which process respondent's counsel's bid was excluded as "against the interests of the class", *In re Cendant Corporation Securities Litigation*, 109 F. Supp.2d 285, 297 (D.N.J. 2000)), the court appointed petitioner's counsel, Kirby McInerney & Squire, as lead counsel for the Prides class. On November 11, 1998, class counsel filed an amended and consolidated class action complaint, along with other motions for class certification, a preliminary injunction, and summary judgment. The district court thereupon uncoupled the Prides litigation from the other litigation, and styled its caption *In re Cendant Corporation Prides Litigation*, Civ. No. 98-2819.

2. The Settlement. On March 17, 1999, the parties submitted a proposed settlement agreement to the court. Under that agreement, Cendant agreed to issue a security called a Right to each authorized claimant, one Right for each Prides beneficially held by a claimant. App. 2a-3a. The Rights essentially represented an option that, if exercised, would lead to the acquisition of additional shares of Cendant stock. Rights would be and were freely tradeable for cash on the New York Stock Exchange, but they would and did expire at the close of business on February 14, 2001. App. 11a.

The total theoretical value of Rights available to satisfy the claims of the eligible class members, counsel fees, and litigation expenses was approximately $341,480,861. App. 53a. At the very minimum, this aggregate class recovery represented 100 cents on the dollar. App. 8a. Unsurprisingly, given such a favorable settlement, no class member objected; and none, including respondent, opted out. App. 5a.

3. The Fee Award. Counsel sought fees to be paid in the same Rights granted to the class. The payment sources were, however, limited to reflect the terms of the court sponsored auction process: Fees were to be paid from (a) Rights left unclaimed by class members, (b) Rights that would have been paid, if any, to opt-outs, and (c) Rights that would have been issued to defendant underwriter before any reduction in the Rights provided to authorized claimants. App. 3a. None of the sophisticated investor class members (such as Fidelity or Bank of America) who stood to reap millions of dollars from the settlement objected to the fee request. App. 5a, 54a. Nevertheless, the district court reduced the requested award by 43% (App. 18a n.13), even though it found that counsel had performed in an extraordinary manner (App. 13a n.8, 56a), and that "[t]he class [was] made completely whole." App. 5a, 54a.

Respondent alone opposed the counsel fee request, and only because of its counsel's own fee ambitions. App. 5a. Respondent's counsel, as has been noted, had been found by the district court to be unqualified to serve as class counsel. *See supra*, p. 4.

4. The Court of Appeals. By the time the appeal to the Third Circuit had been filed, it was absolutely certain, as that court recognized, that no class member, including respondent, could receive even a penny more as a result of a successful appellate challenge to the fee award. App. 8a. The Rights had expired, and any refunded counsel fees would revert to Cendant. Nonetheless, the court explicitly held that respondent could proceed. While ostensibly recognizing that appellate standing must exist for the court to possess appellate jurisdiction (App. 7a), the court nonetheless concluded that "injury in fact", "causation" and "redressibility" components of standing doctrine need not be satisfied. The court also held the more stringent requirement of 28 U.S.C. §1291 and F.R. App. Proc. 3(c), namely, that a would be appellant must be a "party" in order to appeal, had been satisfied. Although characterizing the jurisdictional issue as "troublesome", the court was content to resolve the issue by saying without elaboration that the person "aggrieved" must be construed "broadly" in class actions because it had an "independent interest" in counsel fee awards. App. 8a.

This petition followed.

REASONS FOR GRANTING THE WRIT

This Court's guidance is needed. This petition raises issues of systemic importance concerning the impact of Article III and 28 U.S.C. 1291 on class actions. The court of appeals said that "[Its] interest and supervisory role is pervasive and extends not only to the final fee award but also to the manner

by which class counsel is selected and the manner by which attorneys' fee conditions are established." The court, it said, was a "silent part[y]" in all district court fee awards. App. 8a-9a. For the court, this meant that the injury in fact, causation, and redressibility requirements of Article III, and the "party" requirement of 28 U.S.C. §1291, need not be satisfied. The court's free standing exception to the jurisdictional requirements of Article III and §1291 is in direct conflict with the precedents of this Court and the Ninth Circuit's decision in *Powers v. Eichen, supra.*

The district court clearly had jurisdiction to enter the orders it did: approval of the settlement and award of counsel fees. In so doing, the court had an independent duty to the ensure fairness of the fee award, whether or not anyone objected. *Zucker v. Occidental Petroleum Corp.*, 192 F.3d 1323, 1328-29 (9th Cir. 1999), *cert. denied*, 529 U.S. 1066 (2000). Whether the court of appeals had *appellate* jurisdiction to review the counsel fee order is a far different question, as that court nominally recognized. App. 8a. Standing must exist at all stages of the litigation. "The usual rule in federal cases is that an actual controversy must exist at stages of appellate or certiorari review, and not simply at the date the action is initiated". *Roe v. Wade*, 410 U.S. 113, 125 (1973). "This case-or-controversy requirement subsists through all stages of federal judicial proceedings, trial and appellate . . . [It] is not enough that a dispute was very much alive when suit was filed . . . ." *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477 (1990). Thus no Article III court, at any level, can "'declare principles or rules of law which cannot affect the matter in issue in the case before it.'" *Church of Scientology of California v.*

United States, 506 U.S. 9, 12 (1992), quoting *Mills v. Green*, 159 U.S. 651, 653 (1895).[1]

Here, appellate review was sought by an objector who (a) did not object to a settlement in which the class as a whole, and this objector in particular, received at a minimum 100% on its aggregate substantive claims; (b) did not move to intervene, did not object to the settlement, and objected only to the fee award; and (c) could not benefit from the appeal (nor could any other member of the class as a whole). App. 8a, 54-55a. As the Third Circuit recognized, "any reduction in the amount of attorney's fees . . .will not be distributed among the class members" and "the [appellant] presumably will not benefit from reduction in [ ] attorneys fees". App. 8a, 9a. We are aware of no instance – none – in which a litigant with no interest in the outcome of an appeal has been permitted to invoke the appellate "judicial power of the United States," or has been held to be a party for purposes of 28 U.S.C. §1291 and F.R. App. Proc. 3(c). "A party who receives all that he has sought generally is not aggrieved by the judgment affording the relief and cannot appeal from it." *Deposit Guaranty Nat'l Bank, Jackson, Mississippi v. Roper*, 445 U.S. 326, 333 (1980).

1. Acknowledging that subject matter jurisdiction "is inflexible and without exception," *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 84-85 (1998), the court said that "we may not hear this appeal if the [objector] does not have standing." App. 7a. Significantly, however, and directly contrary to the Ninth Circuit's decision in *Powers v. Eichen*, *supra*, 229 F.3d at 1254 n.4, the court believed that the appellant need not satisfy "the [three elements of the]

---

[1] This means, of course, that "if the plaintiff loses standing at any time . . . in the district court or the appellate courts, . . . the court loses jurisdiction". *Altman v. Bedford Cent. School Dist.*, 245 F.3d 49, 69 (2d Cir. 2001).

irreducible constitutional minimum of standing": concrete injury in fact, causation, and redressibility. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). *See also*, e.g., *Vermont Agency of Natural Resources v. United States ex rel Stevens*, 529 U.S. 765, 771 (2000); *Friends of Earth, Inc. v. Laidlaw Environmental Sevices, Inc.*, 528 U.S. 167, 180-81 (2000). The court no where even mentions, let alone applies, these criteria.[2]

In *Powers*, the Ninth Circuit applied this Court's standing criteria, and found that they were satisfied since the class members could benefit from a reduction in the fee award because that reduction might inure to the class members. Here, by contrast, the appealing objector to the fee award could not satisfy any one of these requirements. The objector had no injury, let alone a "concrete" injury. "An interest unrelated to injury in fact is insufficient to give a plaintiff standing." *Vermont Agency*, *supra*, 529 U.S. at 772. *Roper* is a particularly instructive contrast. There, putative class representatives refused individual settlement offers of 100% on their claims. They were held to have standing to challenge the district court's earlier denial of class certification because they had a separate interest in the award of counsel fees, which would have reduced their own legal expenses. *Roper*, 445 U.S. 336-40. Here, by contrast, the appealing objector had no such interest; its objection was simply that someone else received too much.

Similarly, the court effectively ignored the requirement mentioned in *Roper* that §1291 limits the appellate jurisdiction of the Courts of Appeals to appeal taken by a party aggrieved

---

[2] "We find it remarkable that the Court of Appeals majority did not cite *Lamb's Chapel*, despite its obvious relevance to the case." *Good News Club v. Milford Central School*, 533 U.S. __, 121 S.Ct. 2093, 2101 (2001). *Mutatis mutandis*, that language is applicable here.

by the decision. 445 U.S. at 331. *See also* F.R. App. Proc. Rule 3(c) (a "party").[3] Even though the objector had not moved to intervene and had suffered no injury, the court below concluded that the objector was sufficiently aggrieved. The court acknowledged that the contrary argument "has a superficial attraction." App. 8a. The court's conclusion that §1291 and Rule 3(c) are satisfied is contrary to a wall of authority. Like this Court's Rules 12 and 14, F.R. App. Proc. 3(c) reflects the principle that only "parties" may appeal. This rule is jurisdictional in nature. *Becker v. Montgomery*, 532 U.S. __, 121 S.Ct. 1801, 1807 (2001), and it is not to be relaxed through loose construction. *Ibid.* This Court has left open an important question implicated here, namely, whether an objector who does not move to intervene can appeal a class action settlement.[4] No decision, however, holds that an objector can appeal when neither it nor the class of which it is a part can benefit in any way from the success of the appeal. After stating the rule that only parties can appeal, this Court said in *Marino v. Ortiz*, 484 U.S. 301, 304 (1988):

> The Court of Appeals suggested that there may be exceptions to this general rule, primarily "when the nonparty has an interest that is affected by the trial court's judgment." We think the better practice is for such a nonparty to seek intervention for purposes of appeal; denials

---

[3] So too does 28 U.S.C. §1254(1), which directly governs this petition and provides that the writ may be granted "upon the petition of any party".

[4] *See California Public Employee's Retirement System v. Felzen*, 525 U.S. 315 (1999), affirming by an equally divided vote Judge Easterbrook's opinion in *Felzen v. Andreas*, 134 F.3d 873 (1998), that such objectors are not "parties". *See also In re Brand Name Prescription Drugs Antitrust Litigation*, 115 F.3d 456 (7th Cir. 1997) (Posner, C.J.) (same).

> of such motions are, of course, appealable. (citations omitted).

If having an "interest in the trial court's judgment" does not qualify one for "party" status, surely *not* having an interest cannot.

2. Simply put, the Third Circuit invested itself with a free-standing and wide ranging ombudsman role in class actions, a role unconstrained by Article III and §1291.

> Nor is our responsibility in connection with class action matters restricted to reviewing the final fee determination made by the District Court. Our interest and supervisory role is pervasive and extends not only to the final fee award but also to the manner by which class counsel is selected and the manner by which attorneys' fee conditions are established. App. 15a.

In so holding, the court created a class action exception to the restrictions imposed by Article III and §1291 on its appellate jurisdiction. This is quite apparent from its explanation for why the appeal could proceed:

> 1) the nature of the relationship between class plaintiffs, class counsel, and defendants in class actions requires that the "aggrieved" requirement be construed broadly in class action cases; and 2) the judiciary's independent authority over the appointment of class counsel, the grant of attorneys' fees, and the review of attorneys' fee awards in class actions. In connection with these two principles, . . . we have an independent interest in monitoring

> district courts' fee awards, particularly those awards stemming from Rule 23 class actions. App. 8a.

To say that the word "aggrieved" should be construed broadly in class actions is not to say that, as here, the requirements can be eliminated. Some interest must exist for an appeal to continue. *Friends of the Earth, Inc.*, *supra*, 528 U.S. at 189-90. To talk of being a "silent part[y]" or having a free-standing appellate court's "independent interest" in class actions is incomprehensible. The Third Circuit's "interest" is limited by Article III, §1291, and FRAP 3(c). It has no open ended "independent interest" in any subject unless its appellate jurisdiction is properly invoked. *See Church of Scientology*, *supra*, 506 U.S. at 12; *Altman v. Bedford Cent. School District*, 245 F.3d 49, 69 (2nd Cir. 2001). The Ninth Circuit fully understood that in *Powers v. Eichen*, *supra*; the court below did not.

3. Quite plainly, this objector has no interest that could have been redressed by a successful appeal. But objector's counsel did. Rejected as class counsel, he nonetheless wanted to share in the fee award, even though, as the court below stated, he contributed nothing to the district court proceeding. App. 44a. And so, nominally acting on behalf of a client, disgruntled counsel invoked the federal appellate process in his efforts to extract fees. And he was successful! That court instructed the district court to consider awarding fees to him based upon counsel's "contributions" in the court of appeal. *Id.* The possibility of objector's counsel securing a fee (through a hold-up "negotiation" with class counsel or by pursuing the appeal) was the only "interest" that was implicated in the Third Circuit proceeding. It is a wholly impermissible one, as this Court's decision in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765 (2000), makes plain: "[A]n interest that is merely a

'byproduct' of the suit itself cannot give rise to a cognizable injury in fact for Article III standing purposes." 529 U.S. at 773. "[A] plaintiff cannot achieve standing to litigate a substantive issue by bringing suit for the cost of bringing suit." *Steel Co., supra*, 523 U.S. at 107.

Plaintiff's hunt for attorney's fees will not prevent a case from being moot. *Friends of Earth, supra*, 528 U.S. at 192 n.4. A plaintiff's "interest in attorney's fees is, of course, insufficient to create an Article III case or controversy where none exists on the merits of the underlying claim." *Lewis v. Continental Bank Corp., supra*, 494 U.S. at 480. Indeed, even "... [an] assessment of attorney's fees against a party does not confer standing to pursue the action on appeal." *Vermont Agency, supra*, 529 U.S. at 773, citing *Diamond v. Charles*, 476 U.S. 54, 69-71 (1986).

Courts of appeals are not authorized to issue advisory opinions. Nor are they authorized to license private attorney generals or, as here, to commission bounty hunters seeking counsel fees. Yet, that is precisely what happened here. Article III and §1291 are designed to prevent such abusive practices.

POINT I. THE COURT'S CONCLUSION THAT THE OBJECTOR HAD STANDING CONFLICTS WITH THIS COURT'S PRECEDENT AND IS IN DIRECT CONFLICT WITH THE NINTH CIRCUIT.

A. The Decision Conflicts with this Court's Precedents.

The panel acknowledged that Article III standing is constitutionally required to maintain an appeal and it conceded that the standing was "troublesome." App. 8a. In resolving that issue, however, the court never sought to apply the criteria

repeatedly announced by this Court for determining standing. They are:

> Over the years, our cases have established that *the irreducible constitutional minimum of standing contains three elements*. First, the plaintiff must have suffered an "injury in fact"--an invasion of a legally protected interest which is (a) concrete and particularized, and (b) "actual or imminent, not 'conjectural' or 'hypothetical.' " Second, there must be a causal connection between the injury and the conduct complained of--the injury has to be "fairly ... trace[able] to the challenged action of the defendant, and not ... th[e] result [of] the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision.". . . The party invoking federal jurisdiction bears the burden of establishing these elements. (Citations omitted) (emphasis supplied)

Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992). Numerous decisions of this Court state these criteria.[5] And, of course, that this is "a class action . . . adds nothing." *Lewis v. Casey*, 518 U.S. 343, 357 (1996). In class actions, as elsewhere, even named plaintiffs must show that they personally have been injured. In class actions, as elsewhere,

---

[5] *See*, for example, *Vermont Agency of Natural Resources v. U.S. ex rel. Stevens*, 529 U.S. 765, 772-73 (2000); *Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.*, 528 U.S. 167 (2000); *Federal Election Com'n v. Akins*, 524 U.S. 11, 18-19 (1998); *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 84-85 (1998); *Raines v. Byrd*, 521 U.S. 811(1997); and *Bennett v. Spear*, 520 U.S. 154, 162-63 (1997).

"[t]he desire to vindicate value interests provides no constitutional basis for appeal." *Diamond v. Charles*, 476 U.S. 54, 67 (1986).

Appellant is a class member. Its right to pursue this appeal must rest on "injury" to its own interests, or at the least to some cognizable interest of the class of which it is a part. Unless this requirement is to be entirely emptied of meaning, no such interest exists here. Appellant's own settlement proceeds provided full recovery of the loss from purchasing Cendant PRIDES. App. 8a. More important, when this appeal was filed, neither its recovery nor that of any class member, could be enhanced by even a penny through a reduction in the counsel fee award. Under the settlement, all unclaimed Rights beyond those properly paid as counsel fees reverted to Cendant (App. 8a, 54a), which did not appeal. Indeed, the Rights themselves had expired before the Third Circuit entered its judgment.

No one objected to the settlement. The district court approved it, and the court of appeals left that decision, which had not even been appealed, undisturbed. App. 23a. Quite plainly, returning money to the defendant does not benefit appellant or the class. Necessarily, therefore, the court below recognized that "any reduction in the amount of attorney's fees to [counsel] will not be distributed among the class members" (App. 8a) and "the [appellant] presumably will not benefit from a reduction in [ ] attorney's fees." App. 9a. When a court so declares, the court necessarily says that the litigant before it has not established standing. A litigant who does not object to the settlement, recovers its entire loss, is not required to pay any fee with respect to it, and is unable to secure additional recovery for itself or the class by appeal, lacks standing.

The court's response is that the injury in fact requirement is met by construing broadly the concept of an "aggrieved" party. App. 8a. What can that possibly mean?

Construing injury in fact "broadly" still requires the existence of some identifiable injury if the appellate process is to continue, as this Court said in *Friends of Earth*, *supra*, 528 U.S. at 180-81. No identifiable injury of any kind exists here. This objector has lost nothing. And it did not even make the pretense that in prosecuting the appeal it is attempting to impugn an otherwise corrupt or inadequate settlement.

The only interest at issue is created by the appeal itself: a bounty hunting lawyer's effort to secure a fee for himself. As we have pointed out (*supra* p.13), *Vermont Agency*, *supra*, 529 U.S. at 773, makes clear that such an interest cannot satisfy Article III. A plaintiff's "interest in attorney's fees is . . . insufficient to create an Article III case or controversy where none exists on the merits of the underlying claim". *Lewis v. Continental Bank Corp.*, *supra*, 494 U.S. at 480.[6]

Standing requirements must be met when an appeal is filed. *See*, for example, *Diamond v. Charles*, *supra*, 476 U.S. at 67 ("Article III requires more than a desire to vindicate value interests"). And an interest must continue in some form throughout the appeal, as *Friends of Earth*, *supra*, makes plain. When it becomes clear that appellant lacks standing, this Court vacates the judgment and remands with instructions to dismiss the appeal for want of jurisdiction. E.g., *Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 541 (1986); *Iron Arrow Honor Society v. Heckler*, 464 U.S. 67, 72 (1983) (*per curiam*). "Our ordinary practice in disposing of a case that has become moot on appeal is to vacate the judgment with

---

[6] To find support from this Court, the court (App. 16a) roamed far afield and invoked *Powers v. Ohio*, 499 U.S. 400 (1991), a criminal jury pre-emptory challenge case. But Powers's injury is his *conviction* by an improperly constituted jury. No one suggests that Powers could have appealed had he been acquitted, that is, received a judgment in his favor.

directions to dismiss." *Lewis v. Continental Bank Corp.*, *supra*, 494 U.S. at 482.

B. The Decision Below It Is In Direct Conflict with The Ninth Circuit's Decision in *Powers v. Eichen*.

The decision is not only inconsistent with this Court's cases, it is in direct conflict with the Ninth Circuit's decision in *Powers v. Eichen*, 229 F.3d 1249, 1254 n.4 (2000), which, as here, was an appeal by an objector from the award of counsel fees. That court squarely recognized that Article III standing must be satisfied in class action fee appeals, and thus the court went on to apply this Court's three "irreducible requirements." The court found that this Court's criteria were satisfied because the class as a whole might benefit from a reduction of counsel fees, which were awarded from the settlement fund. *See* 229 F.3d at 1254, n.4. The court of appeals below masked its conflict with the Ninth Circuit because of its misapprehension of Ninth Circuit law. The court cited *Zucker v. Occidental Petroleum Corp.*, 192 F.3d 1323 (9th Cir. 1999), and *Lobatz v. U.S. West Cellular of Calif., Inc.*, 222 F.3d 1142 (9th Cir. 2000). *Zucker* held that the court need not decide whether a non intervening fee objector could appeal because it had jurisdiction to hear the matter anyway. *Id.* at 1328-29 (appellant was class counsel who had standing because his fee had been cut).

In *Lobatz*, appellant *did* object to the settlement, but failed properly to perfect that appeal. The court permitted the concurrent appeal against the counsel fee award to proceed, even though they were to be paid from a separate fund. The court concluded that it *might* be possible to direct a portion of the fee to the class if it were shown that "class counsel allegedly agreed to take excessive attorney fees and costs from the defendants *in exchange for entering into an unfair class*

settlement" (222 F.3d at 1147). Thus, unlike this case, the objector's claim arose from an objection to the settlement. *Powers v. Eichen*, *supra*, 229 F.3d, at 1254 n.4, decided after *Lobatz*, makes clear that in the Ninth Circuit Article III standing is required in class action fee appeals.

POINT II. THIS OBJECTOR IS NOT A PARTY FOR PURPOSES OF 28 U.S.C. §1291, AND F.R.APP. PROC. 3(c).

Article III is not the only limitation on the appellate jurisdiction of the court of appeals. Federal appellate courts "must first consider whether we have [statutory] jurisdiction to decide this case". *Florida v. Thomas*, 532 U.S. __, 121 S. Ct. 1905, 1908 (2001). Like this Court's Rules 12 and 14, Fed. R. App. Proc. 3(c) is jurisdictional rule, *Becker v. Montgomery*, *supra*, and it reflects the principle that only parties may appeal. *See also* 28 U.S.C. §1254(1), which directly governs this proceeding and which restricts petitioners to "any party." While §1291 itself does not mention the term "party", it has been consistently understood to contain such a limitation. Thus, as this Court said in *Marino v. Ortiz*, 484 U.S. 301, 304 (1988), "[t]he rule that only parties to a lawsuit, or those that properly become parties, may appeal an adverse judgment, is well settled."

Neither Rule 3(c) nor this Court's Rule 12 defines "party", but as the case law and this Court's Rule 14(b) make clear, this term properly includes persons other than those listed in the pleading captions. This Court's decisions support grouping "ancillary" parties into three general categories. First, where the appellant is himself the direct object of a judicially enforceable order, such as an injunction or a contempt citation. *E.g.*, *United States v. Nixon*, 418 U.S. 683 (1974). Second, where the court purports directly to affect legally established rights or duties of named persons. *E.g.*, *Kneeland v. American*

Loan & Trust Co., 136 U.S. 89, 94 (1890); *Blossom v. The Milwaukee Railroad & C.R. Co.*, 68 U.S. 655, 655-56 (1863). In these circumstances, the judicial order must do more than simply disadvantage the would-be appellant, as *Marino v. Ortiz*, 484 U.S. 301, quoted below, makes plain. Rather, it must operate directly upon the rights or duties of named persons. Third, and of greatest significance here, where the appellant has unsuccessfully sought to intervene in the proceeding. *Id.*

The courts of appeals are divided on the issue of whether an objector who does not move to intervene may appeal a class action settlement.[7] However, no decision by any such court supports an appeal by objecting class member when the outcome of that can in no way benefit the objector or the class. *Marino v. Ortiz*, *supra*, is dispositive that such an objector cannot be considered a party. After stating the rule that only parties can appeal, the Court denied that having "an interest that is affected by the trial court's judgment" suffered. 484 U.S. at 304. If having an interest in the trial court's judgment does not qualify one for "party" status, surely *not* having an interest cannot.

The objector has no interest in the outcome; and the interest of its bounty hunting attorney cannot qualify. The Third Circuit's statement that it has an "interest" in a class action is far wide of the mark. As this Court said in *Bender*, *supra,* "Federal courts are not courts of general jurisdiction." 475 U.S. at 541. They "possess jurisdiction only as conferred by Congress." R. Fallon, *Of Justicability, Remedies and Public Law Litigation: Notes on the Jurisprudence of Lyons*, 59 N.Y.U.L. Rev. 1, 58 (1984). No amount of rhetorical assertion

---

[7] *See* p. 10, n.4. *See also Powers v. Eichen*, *supra*, 229 F.3d at 1252-56, discussing the circuit split. There are powerful reasons to support the Seventh Circuit's view, and we are prepared to support it.

that the term "person aggrieved" must be construed "broadly" can obscure that a non party has been permitted to invoke the federal appellate process.

CONCLUSION

. The petition for a writ of certiorari should be granted, and the judgment below summarily reversed.

Dated: July 12, 2001

Respectfully submitted,

Roger W. Kirby
Counsel of Record
Kirby McInerney & Squire, LLP
830 Third Avenue, 10th Floor
New York, NY 10022
(212) 371-6600

Henry P. Monaghan
Harold Edgar
435 West 116th Street
New York, NY 10027
(212) 854-2644

Attorneys for Petitioners

APPENDIX

Filed March 21, 2001

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 99-5555

IN RE: CENDANT CORPORATION PRIDES LITIGATION

WELCH & FORBES, INC., an institutional investment manager, individually and on behalf of all others similarly situated,

v.

CENDANT CORPORATION, MERRILL LYNCH & CO.; CHASE SECURITIES, INC.; HENRY R. SILVERMAN; WALTER A. FORBES; COSMO CORIGLIANO

JOANNE A. ABOFF FAMILY TRUST,

Appellant

Pursuant to Rule 12a

On Appeal from the United States District Court
for the District of New Jersey
(D.C. Civ. No. 98-02819)
District Judge: Honorable William H. Walls

Argued: Friday, December 15, 2000

BEFORE: SCIRICA, FUENTES
and GARTH, Circuit Judges

(Opinion Filed: March 21, 2001)

OPINION OF THE COURT

GARTH, Circuit Judge:

This appeal arises out of a class action filed on behalf of investors in Cendant Corporation ("Cendant") after Cendant disclosed prior "accounting irregularities" on April 15, 1998.[1] Several actions were filed as a result of this disclosure, including an action commenced on June 15, 1998 on behalf of purchasers of Cendant's Feline PRIDES shares. The PRIDES litigation was subsequently consolidated with the other pending Cendant actions. However, on August 4, 1998, the District Court ruled that separate lead plaintiffs and lead counsel were to represent the interests of the PRIDES shareholders, as distinct from the rest of the Cendant class. (JA1300-01.)

The firm of Kirby, McInerney & Squire, formerly Kaufman, Malchman, Kirby & Squire, ("Kirby") was appointed as lead counsel of the Cendant PRIDES class. On November 12, 1998, Kirby filed a motion for class certification, for summary judgment on the claims under § 11 of the Securities Act, and for injunctive relief. On behalf of the PRIDES class, Kirby entered into a proposed settlement agreement with Cendant on March 17, 1999– three and a half months after Kirby's motions were filed and no more than nine months after the action had been started.

Under the settlement agreement, Cendant agreed to issue Rights to new PRIDES, with a stated value of $11.71.

---

[1] Although there are other defendants, we refer to all the defendants as Cendant.

(JA576-79.) Those rights were in trade for existing PRIDES. The total possible number and amount of Rights to be distributed pursuant to the agreement was 29,161,474, with an approximate stated value of $341,500,000. (JA590.) Regarding Kirby's attorneys' fees, the settlement agreement provided: "Cendant . . . will take no position on an application by Lead Counsel for an award of fees and expenses provided that such application shall not request fees in excess of 10% percent [sic] of the aggregate Stated Value of 29,161,474 Rights, which is approximately $341,500,000, plus reasonable expenses incurred by Lead Counsel in connection with this Action." (JA590.)

The Notice of Pendency of Class Action summarized the proposed settlement of the PRIDES litigation. (JA239-52.) In connection with "Lead Counsel's fees and expenses," the Notice stated: "Lead Counsel has notified the other signatories hereto that it intends to apply to the Court for an award of fees, in an amount not to exceed 10% of the aggregate Stated Value of 29,161,474 Rights, or approximately $34.1 million, plus reasonable expenses." (JA247.) The Notice went on to explain how the attorneys' fees would be paid, first out of "Unclaimed Rights,"[2] then out of "Opt Out Rights," then out of the rights of class members with claims.[3]

---

[2] "Unclaimed Rights" are defined in the Stipulation and Agreement of Compromise and Settlement as "Rights as to which a timely and valid Proof of Claim has not been filed by a Holder ." (JA576.) All Unclaimed Rights "shall be cancelled and Cendant shall not issue, sell, or distribute any further Rights to any other person." (Notice of Proposed Settlement, JA248.) In addition, the Settlement provided that, though "Merrill Lynch beneficially owned 738,526 PRIDES as of the close of business on April 15, 1998, Merrill Lynch nevertheless is not a class member and cannot recover new PRIDES in connection with the Settlement." (JA577.)

[3] The settlement consisted of 29,161,474 Rights. After subtracting the attorneys' fees and expenses for Lead Counsel, 27,308,617 Rights

(continued...)

The Notice also asserted:

> You also should know that the lead counsel appointment process included a court-mandated bidding process. This was intend to assure that the largest possible portion of any recovery remained with participating class members, or conversely that qualified lead counsel took the least possible sums from the benefits to be obtained by participating class members. In Lead Counsel's view, under the fee mechanism proposed by Lead Counsel and described herein, there is a substantial likelihood that a substantial part, if not all, of the fees sought will be obtained from Unclaimed Rights and Opt Out Rights. As a consequence, in Lead Counsel's view, those Class Members who become Authorized Claimants will not have to pay any of Lead Counsel's fees, or if they do, there is a substantial likelihood that it will be less than the amount otherwise payable under the bids approved by the Court in the process of appointing lead counsel.

(JA247.)

(...continued)
remained. Proofs of Claim were filed with respect to 26,606,422 Rights, of which 22,502,782 Rights were validated by the claims administrator as of August 18, 1999. (Kirby Aff., Ex. L, atP 2.) Pursuant to the settlement agreement, the unclaimed Rights that were not used to pay Kirby for its fees and expenses were to be canceled by Cendant. Because the total amount of Rights requested in the Proofs of Claim (26,606,422 Rights) was less than the amount of the settlement, after subtracting the amount to be given to Kirby (1,650,680 Rights, valued at $19,329,463), no claiming class members have had or will have their recovery reduced by the fees and expenses taken by Kirby.

On May 4, 1999, the Joanne A. Aboff Trust ("Trust") filed several objections to the notice of settlement, all of which pertained to Kirby's representation and fee request,[4] as well as a notice of its intention to appear at the settlement hearing. (JA38-78.) At the settlement hearing on May 18, 1999, lead counsel stated that "[t]here is no objection to the settlement," (JA736), and the Trust's attorneys objected only to selection of class counsel and Kirby's request for attorneys' fees.

On June 15, 1999, the District Court signed an Opinion and Order approving the settlement, stating: "The Court considers the settlement to be eminently fair and reasonable. The class is made completely whole by such compensation. There are no objections voiced to the settlement--only to the request for attorney fees. The proposed settlement is approved subject to the following modifications to the attorneys' fees." *In re Cendant Corp. PRIDES Litig.*, 51 F.Supp.2d 537, 541 (D.N.J. 1999).

The District Court granted Kirby's request for expenses, finding that the requested expenses of $2,367,493 were "reasonable and necessary to the prosecution of this litigation." 51 F.Supp.2d at 542. Then the Court found that, for attorneys' fees, Kirby should receive a number of Rights equivalent to

---

[4] The Trust's objections concerned: 1) a "confidential Supplemental Agreement" between lead plaintiff and Cendant which was included in the Settlement but not published and apparently contained information about Cendant's and Lead Plaintiff 's obligations under the Settlement; and 2) "lead counsel's excessive fee request." (JA39-40.) The Trust argued, *inter alia*, that "[t]he combination of this unusual confidential agreement with Lead Counsel's excessive fee request . . . multiplies the potential that the class and the public will suspect that the settlement contains a collusive or improper provision by which Lead Plaintiff, Lead Counsel, and/or Cendant will benefit at the expense of the class." (JA46.) The text of this "Supplemental Agreement" does not appear in the record, nor can we tell if it was discussed in the Notice.

5.7% of the balance of Rights received by the Class. That percentage amounts to 1,650,680 Rights, valued at approximately $19,329,463. The District Court directed "Lead Counsel to seek to satisfy payment of these awards of expenses and fees from any unclaimed Rights. Then, and only then, to the extent that such fees and expenses have not been satisfied by unclaimed Rights, shall any deficiency be assessed against and borne by the class." 51 F.Supp.2d at 542. The Court went on to instruct that "[a]ny rights unclaimed after authorized class claimants and Lead Counsel have been issued their entitled Rights shall be canceled by Cendant Corporation." 51 F. Supp.2d at 542.

On June 15, 1999, the District Court entered an Order and Judgment[5] certifying the PRIDES class for settlement, approving the settlement "and the distribution of Rights and New PRIDES to Authorized Claimants set forth therein," dismissing with prejudice all settled claims, and awarding Lead Counsel 1,650,680 Rights as reasonable attorneys' fees and 202,177 Rights as reimbursement of Lead Counsel's reasonable expenses. (JA728-30.) On the same date and as part of its opinion, the District Court denied the Trust's application for attorneys' fees. On July 22, 1999, the Trust timely appealed the District Court's June 15 Orders and Judgment.

We have jurisdiction over this appeal pursuant to the final order doctrine of 28 U.S.C. § 1291, and we review the District Court's award of attorneys' fees for an abuse of discretion, "which can occur `if the judge fails to apply the proper legal standard or to follow proper procedures in making the determination, or bases an award upon findings of fact that are clearly erroneous.' " *Zolfo, Cooper & Co. v. Sunbeam-Oster*

---

[5] The District Court judge signed both the Opinion and the Order and Judgment on June 15, 1999, but the Opinion was filed on June 16, 1999 and the Order and Judgment was filed on June 24, 1999.

Co., 50 F.3d 253, 257 (3d Cir. 1995) (quoting *Electro-Wire Prods., Inc. v. Sirote & Permutt, P.C. (In re Prince)*, 40 F.3d 356, 359 (11th Cir. 1994)).

On August 27, 1999, Kirby filed a Motion in this court to dismiss the Trust's appeal for lack of standing, as well as presenting the standing issue in its appellate brief.

I.

Before we consider the merits of the Trust's appeal, a threshold question must be answered: does the Trust have standing to challenge the District Court's award of attorneys' fees to Kirby? *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94-95 (1998) (stating that "[t]he requirement that jurisdiction be established as a threshold matter `spring[s] from the nature and limits of the judicial power of the United States' and `is inflexible and without exception' "). Because "the core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III," *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992), we may not hear this appeal if the Trust does not have standing.

"Ordinarily, only a party *aggrieved* by a judgment or order of a district court may exercise the statutory right to appeal therefrom. A party who receives all that he has sought generally is not aggrieved by the judgment affording the relief and cannot appeal from it." *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 333 (1980) (emphasis added). In *Ace Heating & Plumbing Co. v. Crane Co.*, the Third Circuit explicated the application of this principle to class actions, holding: "*aggrieved* class members may appeal any final order of a district court in proceedings held pursuant to Rule 23. This general proposition holds true even though such class members have the right to exclude themselves from the class." 453 F.2d 30, 32 (3d Cir. 1971) (emphasis added).

The standing question in this case is troublesome, because it appears as if the PRIDES settlement has provided the class members with full recovery and because any reduction in the amount of attorneys' fees to Kirby will not be distributed among the class members, but instead those rights will be returned to and canceled by Cendant. Therefore, Kirby argues, the Trust is not aggrieved by the award of attorneys' fees and has no standing to appeal.

While this argument admittedly has a superficial attraction because the PRIDES class members will seemingly recover a "dollar-for -dollar" return for their claims and Kirby's fees will not reduce their recovery, we nevertheless hold that the Trust does have standing to appeal the award of attorneys' fees.[6] We base this holding on two related concepts: 1) the nature of the relationship between class plaintiffs, class counsel, and defendants in class actions requires that the "aggrieved" requirement be construed broadly in class action cases; and 2) the judiciary's independent authority over the appointment of class counsel, the grant of attorneys' fees, and the review of attorneys' fee awards in class actions. In connection with these two principles, we require that district courts conduct an extensive analysis and inquiry before determining the amount of fees, because we have an independent interest in monitoring district courts' fee awards, particularly those awards stemming from Rule 23 class actions. *See, e.g., Zucker v. Occidental Petroleum Corp.*, 192 F.3d 1323, 1328 (9th Cir. 1999); *see generally* Advisory Committee's Notes on Fed. R. Civ. P. 23, 28 U.S.C., Notes following Rule 23 (addressing, *inter alia*, "the question of the measures that might be taken during the course of the action to assure procedural fairness"). Indeed, we are in

---

[6] Our holding that the Trust has standing to appeal disposes of the motion made by Kirby on August 27, 1999 to dismiss the Trust's appeal. We will deny that motion.

effect third parties to the fee award process, albeit silent parties for the most part until the award is finalized and reviewed.

A.

Ostensibly, lead class counsel represents all class plaintiffs. However, in attempting to settle a large class action, class counsel must often spend more time negotiating with and interacting with the defendants than with their own clients. This situation presents several dangers. First, as we observed in *Prandini v. National Tea Co.*, "a defendant is interested only in disposing of the total claims asserted against it [, and] the allocation between the class payment and the attorneys' fees is of little or no interest to the defense." 557 F.2d 1015, 1020 (3d Cir. 1977). Moreover, the "divergence in [class members' and class counsel's] financial incentives . . . creates the `danger . . . that the lawyers might urge a class settlement at a low figure or on a less-than-optimal basis in exchange for red-carpet treatment for fees.' " *In re General Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig.* (hereinafter "*In re GM Trucks*"), 55 F.3d 768, 820 (3d Cir. 1995) (quoting *Weinberger v. Great Northern Nekoosa Corp.*, 925 F.2d 518, 524 (1st Cir. 1991).

This unique relationship among plaintiffs' counsel, plaintiffs, and defendants in class actions imposes a special responsibility upon appellate courts to hear challenges to fee awards by class members whose claims may have been reduced or in some way affected in exchange for large fee awards. *See In re GM Trucks*, 55 F.3d at 819-21. This is so even in this case, where the Trust presumably will not benefit from a reduction in Kirby's attorneys' fees, because the PRIDES settlement was structured so that any remaining Rights will be returned to Cendant.

The Ninth Circuit addressed a similar situation in *Zucker v. Occidental Petroleum Corp.*, 192 F .3d 1323 (9th Cir.

1999), pointing out in its discussion that, even where the plaintiff "gets the same money whether the fee is cut or not, . . . a client whose attorney accepts payment, without his consent, from the defendants he is suing, may have a remedy, and this remedy may extend to a plaintiff class whose class attorneys accept payment from the defendants the class is suing." 192 F.3d at 1326.

The Ninth Circuit took this reasoning a step further in *Lobatz v. U.S. West Cellular of Calif.*, in which the court, holding that a class member had standing to appeal an attorneys' fee award "even though that award was payable independent of the class settlement," stated:

> If . . . class counsel agreed to accept excessive fees and costs to the detriment of class plaintiffs, then class counsel breached their fiduciary duty to the class [, and] any excessive award could be considered property of the class plaintiffs, and any injury they suffered could be at least partially redressed by allocating to them a portion of that award.

Lobatz, 222 F.3d 1142, 1147 (9th Cir . 2000).

Under the Ninth Circuit's analysis, therefore, the Trust need not benefit from a reduction in Kirby's fee to have standing to appeal. Moreover, the Ninth Circuit suggested in *Zucker* that the requirement that class plaintiffs be aggrieved should be construed broadly, citing Judge Sneed's observation in his dissent in *In re First Capital Holdings* "that `[a]rguably, a class member always retains an interest in attorney fees, even when her claims have been met in full.' " *Zucker*, 192 F .3d at 1328 (quoting *In re First Capital Holdings Corp. Fin. Prods. Sec. Litig.*, 33 F.3d 29, 31 (9th Cir. 1994) (Sneed, J., dissenting).

As a class member, the Trust was eligible to receive "one Right, a marketable security freely tradeable until February 14, 2001, having the terms described herein for each Income PRIDES and Growth PRIDES ($50.00 face amount) beneficially owned by Class members at the close of business on April 15, 1998 if such Class member submits a valid and timely proof of claim form." (JA239.) The Notice of the Proposed Settlement stated that "[e]ach Right will be designed to have a stated or theoretical value of $11.71," but acknowledged that "the Rights may trade in the market at a price below their theoretical value." (JA239.) Moreover, the Notice stated that "Cendant believes that recoverable damages (if any) per share could be lower or higher than the per PRIDES damages estimated by lead counsel for the Class." (JA239.)[7]

Though Kirby asserts that each class member received full recovery from this settlement, in which case, it is contended, the Trust would not be aggrieved by the fee award, the description of the settlement in the Notice and its ultimate implementation by class members is uncertain as to class members' actual recovery. Because class members received rights which must be traded on the market to be liquidated, a number of factors could contribute to class members not receiving the theoretical $11.71 per Right. It is noteworthy that the settlement provided class members with no immediate cash payment, but rather left class members in the position of relying on the marketability of their new Rights for reimbursement of their claims. That reliance, apart from any other market risks, might itself be chancy in light of Cendant's history of

---

[7] The settlement, as noted above, provides for Rights which are "freely tradeable until February 14, 2001," which date has passed. The record does not disclose whether all the claimed Rights have been traded or the actual value of those Rights. Hence, because the record is silent and the settlement itself has not been challenged on this appeal, we do no more than call attention to that aspect of the settlement.

"accounting irregularities" and in light of the recent market and economy slow down.

Nor does even a "dollar-for-dollar" recovery in cash undermine our power and jurisdiction and our special responsibility to review fee awards. Indeed, though the fact of market fluctuation and its effect on the value of class members' recovery influences our decision that the Trust has standing, we are equally convinced of our appellate jurisdiction over class settlements in which plaintiffs received a "dollar-for-dollar" recovery in cash. Indeed, it would be preposterous to hold that, even where a district court awarded a fee of 75% of the recovery to class counsel, we would have no power to review such an inappropriate and outrageous award in the absence of an objector whose claims had been directly reduced as a result of the award. Our oversight and supervisory function would necessarily come into play to correct such a decree. This duty of review with which we are vested will be discussed in more detail in the next section.

B.

As indicated above, we are convinced of our obligation to vacate the District Court's order awarding fees by the special position of the courts in connection with class action settlements and attorneys' fee awards. As we observed in *In re GM Trucks*,"a thorough review of fee applications is required in all class action settlements." 55 F.3d at 819. Specifically, the danger inherent in the relationship among the class, class counsel, and defendants "generates an especially acute need for close judicial scrutiny of fee arrangements" in class action settlements.[8] 55 F.3d at 820. In discussing this duty of district

---

[8] We should make clear that we do not attribute any motives or designs to Kirby that would indicate any conflict by Kirby with its

(continued...)

courts to oversee class settlements in *In re GM Trucks*, we explained:

> the court's oversight task is considerably complicated by the fact that these attorney-class conflicts are often difficult to discern in the class action context, "where full disclosure and consent are many times difficult and frequently impractical to obtain." Finally, we emphasize that the court's oversight function serves not only to detect instances of "the actual abuse [that potential attorney-class conflicts] may cause, but also [the] potential public misunderstandings they may cultivate in regard to the interests of class counsel."

55 F.3d at 820 (quoting *In re Agent Orange Prod. Liab. Litig.*, 818 F.2d 216, 224, 225 (2d Cir . 1987)). In other words, we indicated in *In re GM Trucks* the importance of the judicial role in finalizing class action settlements, and we suggested that this importance derived from general concerns about "potential public misunderstandings" as much as from a desire to protect the plaintiffs in the particular class.

In *Zucker*, in asserting that the district court was required to review the award of attorneys' fees regardless of

---

(...continued)
responsibility to the class, nor do we mean to intimate that Kirby acted improperly. Indeed, as the District Court found and we have no reason to dispute, Kirby discharged its function as lead counsel in exemplary fashion. The cautions we express, which are present in the unique context of class actions and the fee awards which arise in this context, pertain solely to the issue of whether, where class members have apparently received dollar-for-dollar recovery, standing is available for an objector to a fee award. For all the reasons we express here, we are satisfied that it is.

whether anyone had standing to challenge the award, the Ninth Circuit stated:

> In a class action, whether the attorneys' fees come from a common fund or are otherwise paid, the district court must exercise its inherent authority to assure that the amount and mode of payment of attorneys' fees are fair and proper. This duty of the court exists independently of any objection. Therefore it exists, *a fortiori*, regardless of whether an objector has a remediable economic stake in the court's decision. Because the district court had the authority and duty to pass upon the fairness of the attorneys' fees settlement independently of whether there was objection, we need not decide whether the objector had standing.

192 F.3d at 1328-29.

The court in *Zucker* further explained that"[n]o Article III case or controversy is needed with regard to attorneys' fees as such, because they are but an ancillary matter over which the district court retains equitable jurisdiction." 192 F.3d at 1329. The Ninth Circuit found support for this proposition in the reasoning of the Eighth Circuit that "because `the reasonableness of attorneys' fees is within the overall supervisory authority' of the court in a class action, the court did not need to reach the question of whether an objector has standing." *Zucker*, 192 F .3d at 1329 (quoting *Grunin v. Int'l House of Pancakes*, 513 F .2d 114, 127 n.13 (8th Cir. 1975)).

While the statements in *In re GM Trucks* and *Zucker* refer to the authority of district, not appellate, courts in connection with class action settlements, the cases make clear that reviewing courts retain an interest--a most special and

predominant interest--in the fairness of class action settlements and attorneys' fee awards. Accordingly, our interest as a reviewing court in ensuring that district courts fulfill their obligations and comply with the instructions and guidelines in this area bolsters our determination that the Trust has standing to challenge Kirby's fee award.

Nor is our responsibility in connection with class action matters restricted to reviewing the final fee determination made by the District Court. Our interest and supervisory role is pervasive and extends not only to the final fee award but also to the manner by which class counsel is selected and the manner by which attorneys' fee conditions are established.

Here, the District Court employed a sealed-bid auction to select class counsel. That process, which occurred virtually at the inception of the instant class action, is itself fee-driven. As such, it invites, indeed requires, judicial examination and, hence, our jurisdiction. This is so both because of the unique relationship between class members, class counsel, and the defendants in class actions and because of our strong interest in the fairness of class settlements and the cost of achieving such settlements. *See, e.g.*, John C. Coffee, Jr., National Law Journal, Sept. 14, 1998, at B6 (discussing selection of lead counsel through auctions and "bidding rules").

Because it is the district court's function to participate in the litigation process in this way, as the District Court did here, and because, as noted, our judicial scrutiny reaches to all corners of the class action process including the selection of class counsel--a selection which impacts on the final fee award and fairness of the settlement--we would be remiss if we failed to exercise our jurisdiction in this area.

An analogy, albeit one that is far afield from class action fees, is helpful to illustrate and emphasize the court's interest

and the role that our interest plays in our decision to hear this appeal. In *Powers v. Ohio*, a post-*Batson* case,[9] the Supreme Court held that a white criminal defendant had standing to object to and appeal the exclusion of black jurors through peremptory challenges, even though the defendant and the potential jurors were of different races. 499 U.S. 400 (1991). In its discussion of standing, the Court stated:

> The discriminatory use of peremptory challenges by the prosecution causes a criminal defendant cognizable injury, and the defendant has a concrete interest in challenging the practice. This is not because the individual jurors dismissed by the prosecution may have been predisposed to favor the defendant; if that were true, the jurors might have been excused for cause. Rather, it is because racial discrimination in the selection of jurors "casts doubt on the integrity of the judicial process," and places the fairness of a criminal proceeding in doubt.

Powers, 499 U.S. at 411 (internal citations omitted).

Likewise, just as discriminatory selection of jurors "casts doubt on the integrity of the judicial process" such that the defendant in *Powers* had standing to appeal, the integrity and fairness of class settlements is threatened by excessive attorneys' fee awards such that class plaintiffs have standing to

---

[9] In *Batson v. Kentucky*, 476 U.S. 79 (1986), the Supreme Court "held that a [black] defendant can raise an equal protection challenge to the use of peremptories at his own trial by showing that the prosecutor used them for the purpose of excluding members of the defendant's race." *Powers v. Ohio*, 499 U.S. at 405 (citing *Batson*, 476 U.S. at 96).

challenge excessive fee awards, even when they have received dollar-for-dollar recovery in the class settlement.

Because of the possible injury to the Trust as well as other class members from the fee award in this case and, more importantly, because of our overarching interest in class fee awards, we therefore hold that the Trust has standing to appeal the fee award. Accordingly, we now turn to the fee award that the District Court granted to Kirby and review that award for an abuse of discretion. *See In re GM Trucks*, 55 F.3d 768, 782 (3d Cir . 1995).

II.

There are two primary methods for calculating attorneys' fees: the percentage-of-recovery method[10] and the lodestar method.[11] "The percentage-of-recovery method is generally favored in cases involving a common fund,[12] and is

---

[10] This method has been described as follows:"The percentage of recovery method resembles a contingent fee in that it awards counsel a variable percentage of the amount recovered for the class." *In re GM Trucks*, 55 F.3d 768, 819 n.38 (3d Cir. 1995).

[11] The lodestar method was initially set forth in *Lindy Bros. Builder, Inc. of Philadelphia v. American Radiator & Standard Sanitary Corp.*, 487 F.2d 161 (3d Cir. 1973), *appeal following remand*, 540 F.2d 102 (3d Cir. 1976). As this court explained in *Gunter v. Ridgewood Energy Corp.*, "[a] court determines an attorney's lodestar by multiplying the number of hours he or she reasonably worked on a client's case by a reasonable hourly billing rate for such services given the geographical area, the nature of the services provided, and the experience of the lawyer." 223 F.3d 190, 195 n.1 (3d Cir. 2000).

[12] "[T]he common-fund doctrine . . . allows a person who maintains a lawsuit that results in the creation, preservation, or increase of a fund in which others have a common interest, to be reimbursed from that

(continued...)

designed to allow courts to award fees from the fund `in a manner that rewards counsel for success and penalizes it for failure.' " *In re Prudential*, 148 F.3d at 333. "The lodestar method is more commonly applied in statutory fee-shifting cases, and is designed to reward counsel for undertaking socially beneficial litigation in cases where the expected relief has a small enough monetary value that a percentage-of-recovery method would provide inadequate compensation." 148 F.3d at 333.

The total settlement in this case was valued at $341,500,000, and the District Court granted attorneys' fees in the amount of $19,329,463.[13] As the District Court noted, this amount constitutes 5.7% of the class's total recovery. In connection with the lodestar calculation, the District Court observed that "Lead Counsel, through its principal partners, associates, and paralegals expended approximately 5,600 hours, and its senior partners have a regular hourly rate of $495." 51

(...continued)
fund for litigation expenses incurred." *Court Awarded Attorney Fees, Report of the Third Circuit Task Force*, 108 F.R.D. 237, 241 (1985) (hereinafter "*Task Force Report*").

[13] Kirby's ceiling for fees, as explained in the Notice of Settlement, was ten percent of the total settlement. The settlement was calculated at $341.5 million, ten percent of which would be $34,150,000. That figure was reduced by the District Court to $19,329,463.

F.Supp.2d at 542. Using the $495 hourly rate, the lodestar multiplier[14] for the District Court's fee award is 7.[15]

Two primary principles govern our review of the District Court's fee award to Kirby: 1) did the District Court provide sufficient explanation for granting the fee award of $19.3 million?; and 2) was the award so unreasonably high that the District Court abused its discretion in granting that amount in attorneys' fees?

A.

In *Gunter v. Ridgewood Energy Corp.*, we considered a district court's award of attorneys' fees in a class action settlement. 223 F.3d 190 (3d Cir. 2000). That case involved a $9.5 million settlement, out of which the district court allowed attorneys' fees amounting to 18% of the settlement fund, significantly less than the one-third requested by the attorneys. 223 F.3d at 191. The district court in *Gunter* explained its decision as follows: "The nature of this litigation, its resolution at this stage without the necessity of trial, the nature of the settlement, and its value, convince the court that it would place

---

[14] The Task Force Report explained that, after the lodestar is calculated, "[t]he 'lodestar' then could be increased or decreased based upon the contingent nature or risk in the particular case involved and the quality of the attorney's work. An increase or decrease of the lodestar amount is referred to as a 'multiplier.' " *Task Force Report*, 108 F.R.D. 237, 243.

[15] 5,600 hours x $495 = 2,772,000. $19,329,463 divided by 2,772,000 = 6.97. This multiplier of 7 essentially comports with the information provided by Kirby after oral argument. In that letter, Kirby stated that "the blended hourly compensation to ourselves and those law firms who were working with us was approximately $3,300." (Dec. 19, 2000 Kirby Letter, at 2.) $3,300 divided by $495 = 6.67, only slightly less than the 6.97 multiplier calculated from the figures provided by the District Court.

a reasonable burden on the class to award attorneys' fees of 18% of the Settlement Fund, or $1,700,000." 223 F.3d at 192 (citing *Gunter v. Ridgewood Energy Corp.*, Civ. No. 95-438 (WHW), at 3 (D.N.J. Nov. 16, 1999)). The attorneys appealed the district court's reduction of their fee request.

In reviewing the district court's fee award in *Gunter*, we stated that "[w]e give [a] great deal of deference to a district court's decision to set fees." 223 F.3d at 195. However, we noted, "[n]otwithstanding our deferential standard of review, it is incumbent upon a district court to make its reasoning and application of the fee-awards jurisprudence clear, so that we, as a reviewing court, have a sufficient basis to review for abuse of discretion." 223 F.3d at 196. Therefore, "if the district court's fee-award opinion is so terse, vague, or conclusory that we have no basis to review it, we must vacate the fee-award order and remand for further proceedings." 223 F.3d at 196. In addition, "if a district court does not fulfill its duty to apply the relevant legal precepts to a fee application, it abuses its discretion by not exercising it." 223 F.3d at 196.

In *Gunter*, we vacated the district court's fee award because the district court "dealt with the fee-award issue in a cursory and conclusory fashion" and did not employ the factors which this Court has stated that district courts should consider in awarding fees using the percentage-of-recovery method in common-fund class actions. See *Gunter*, 223 F.3d at 196-97. These factors were set forth in *Gunter* in a footnote:

> Among other things, these factors include: (1) the size of the fund created and the number of persons benefitted; (2) the presence or absence of substantial objections by members of the class to the settlement terms and/or fees requested by counsel; (3) the skill and efficiency of the attorneys involved; (4) the complexity

> and duration of the litigation; (5) the risk of nonpayment; (6) the amount of time devoted to the case by plaintiffs' counsel; and (7) the awards in similar cases.

Gunter, 223 F.3d at 195 n.1 (citing *In re Prudential*, 148 F.3d 283, 336-40 (3d Cir. 1998); *In re GM Trucks*, 55 F.3d 768, 819-22 (3d Cir. 1995)).

As in *Gunter*, the District Court's fee opinion in this case was too cursory for us to "have a sufficient basis to review for abuse of discretion." *Gunter*, 223 F.3d at 196. The District Court did not even specify whether it was using the percentage-of-recovery method or the lodestar method to set attorneys' fees. Nor, if the District Court intended to utilize the lodestar method, did it calculate the lodestar multiplier. Rather, the District Court, in a conclusory paragraph bereft of analysis, stated:

> This Court has examined the time expended by Lead Counsel and the regular hourly rates of its services. Lead Counsel, through its principal partners, associates, and paralegals expended approximately 5,600 hours, and its senior partners have a regular hourly rate of $495. This represents significant effort. But the Court is more impressed by the quality of result than the quantity of effort. The class will receive its full entitlement. And resolution of this matter was greatly accelerated by the creative dynamism of counsel. For this, counsel should not be penalized by a slavish application of the lodestar. We have seen the gifted execution of responsibilities by a lead counsel.

51 F.Supp.2d at 542. Despite the District Court's obvious dissatisfaction with the lodestar method, the court did not even address the percentage-of-recovery method, except to the extent that it calculated that the fee award constituted 5.7% of the total class recovery.

The percentage-of-recovery method has long been used in this Circuit in common-fund cases. Indeed, in the 1985 Third Circuit Task Force report entitled *Court Awarded Attorney Fees*, the Task Force discussed the problems with the lodestar method in detail. "Accordingly, the Task Force recommend[ed] that in the traditional common-fund situation . . . , the district court . . . should attempt to establish a percentage fee arrangement." *Task Force Report*, 108 F.R.D. 237, 255 (1985). Since that time, we have several times reaffirmed that application of a percentage-of-recovery method is appropriate in common-fund cases. *See, e.g., Gunter v. Ridgewood Energy Corp.*, 223 F.3d 190, 195 n.1 (3d Cir. 2000); *Brytus v. Spang & Co.*, 203 F.3d 238, 243 (3d Cir. 2000); *In re Prudential*, 148 F.3d 283, 333-34 (3d Cir. 1998); *In re GM Trucks*, 55 F.3d 768, 821 (3d Cir. 1995).

Though this is not a traditional common-fund case, because the unclaimed portion of the settlement fund is returned to Cendant and because the plaintiffs who recover may not be affected by the attorneys' fee award (depending on the number of plaintiffs who recover rights from the fund), use of the percentage-of-recovery method is appropriate in this case. Since the District Court highlighted the inadequacy of the lodestar method, it can be assumed that that court also perceived that the percentage method was a better method of calculating attorneys' fees in this case. This is consistent with the District Court's opinion awarding attorneys' fees in the larger and separate *Cendant* settlement, in which it did declare, "[f]ollowing established Third Circuit law . . . , the Court will award fees by

a percentage-of-recovery method." *In re Cendant Corp. Litig.*, 109 F .Supp.2d 285, 298 (D.N.J. 2000).[16]

As discussed above, we have articulated at least seven factors to be considered by district courts in setting percentage fee awards in common fund cases. *See Gunter*, 223 F.3d 190, 195 n.1 (3d Cir. 2000). The District Court, however, did not explicitly consider any of these factors.[17] In addition to rejecting the lodestar method, the District Court stated: "The Court appreciates Lead Counsel's verve and the eminently satisfactory results it obtained for the class. There are no objections to the settlement agreement." 51 F.Supp.2d at 541. In addition, the District Court mentioned the initial sealed bidding process and referred to the resulting bid to which Kirby agreed "as a benchmark of reasonableness." 51 F.Supp.2d at 542 (quoting *In re Cendant Corp.*, 182 F.R.D. 144, 152 (D.N.J. 1998)). However, when it came to setting the fee award, the District Court said simply, "[t]he Court determines that counsel fees of 5.7% of this net balance [of the total award less Lead Counsel's expenses of $2,367,493] are reasonable." 51 F.Supp.2d at 542.

---

[16] By referring to the District Court's method of calculating attorneys' fees in the separate Cendant case (*see* text at p. 2, supra, where we noted that the PRIDES shareholders were to be represented separately from the primary Cendant class), we by no means indicate that the fees awarded to the primary Cendant class were a proper exercise of the District Court's discretion. We leave that determination to the panel of this court assigned to review that fee award.

[17] We recognize that our decision in *Gunter* was issued after the District Court ruled on the settlement and fee application in this case and that, therefore, the District Court could not have been informed in its decision by our holding in *Gunter*. However, all of the principles enunciated in *Gunter* have been announced by this court before, in cases predating the District Court's decision on appeal here. *See, e.g., In re Prudential*, 148 F.3d 283, 336-40 (3d Cir. 1998); *In re GM Trucks*, 55 F.3d 768, 819-22 (3d Cir. 1995).

It could be argued that, in the few terse statements quoted above, the District Court took into account three of the seven *Gunter* factors: "the presence or absence of substantial objections by members of the class to the settlement terms and/or fees requested by counsel"; "the skill and efficiency of the attorneys involved"; and "the amount of time devoted to the case by plaintiffs' counsel." *Gunter*, 223 F.3d at 195 n.1. However, the District Court brushed over our required analysis of those factors in setting the attorneys' fees.

Significantly, the District Court did not consider at all the other factors which we deem to be more important in this case, namely "the *complexity* and duration of the litigation" and "the [range of] awards in similar cases." 223 F.3d at 195 n.1 (emphasis added). Nor does it appear that the District Court "cross-check[ed] the percentage award . . . against the `lodestar' award method," which is "suggested" practice for district courts setting fee awards by the percentage-of-recovery method. *Gunter*, 223 F.3d at 195 n.1. Further, the District Court did not "make its reasoning and application of the fee-awards jurisprudence clear." *Gunter*, 223 F.3d at 196.[18]

B.

Because the District Court failed to consider the *Gunter* factors that we deem essential to a proper exercise of discretion

---

[18] The District Court did indicate in its opinion that it was using the bid to which Kirby had agreed "as a benchmark of reasonableness" in setting the fee. 51 F.Supp.2d at 541. However, a preliminary bidding process cannot replace subsequent analysis of the factors listed in *Gunter*. The circumstances and progression of every case are different, and these unique factors must be taken into account by district courts awarding attorneys' fees. Therefore, though the result of a bidding process may be of use to a district court in awarding fees at the end of the case, it cannot supplant post-settlement analysis to determine a reasonable fee.

and to an appropriate consideration of attorneys' fee awards, we will discuss those factors here.

1. *Complexity and Duration of Litigation*

In April 1998, Cendant announced past accounting irregularities and stated that its financial statements for certain past years would be restated. 51 F .Supp.2d at 539. On behalf of the Cendant PRIDES class, Kirby filed an Amended and Consolidated Class Action Complaint on November 11, 1998, accompanied by a motion for class certification, a motion for summary judgment, and a motion for preliminary injunctive relief. Less than two months later, on January 7, 1999, the parties announced that they had reached "an agreement in principal[sic]," and the parties presented a proposed settlement agreement to the District Court on March 17, 1999. 51 F.Supp.2d at 540.

As the District Court observed, "[t]his stage of the litigation, notwithstanding that Lead Counsel has moved for summary judgment, is what would be normally the discovery period, very early on in the litigation." 51 F.Supp.2d at 541. The District Court also noted that Kirby spent approximately 5,600 hours on this action.

In setting Kirby's fee award, the District Court apparently turned a blind eye to the following factors: 1) the case was relatively simple in terms of proof, in that Cendant had conceded liability and no risks pertaining to liability or collection were pertinent; 2) the case was settled at a very early stage of the litigation, with an agreement being announced two months after Kirby filed for class certification and a proposed settlement being submitted to the District Court two months after that; 3) there was a minimal amount of motion practice in this case--before settlement, Kirby submitted only the Complaint and three motions, all on the same day; 4) discovery

was virtually nonexistent--indeed the District Court did not mention any depositions taken or document review conducted by Kirby; and 5) Kirby spent a relatively small amount of time on this case compared to the amount of time expended in most other large class actions.

2. *Range of Awards*

Before reviewing specific awards in other large class settlements, we will review generally the range of attorneys' fee awards in common fund settlements of class actions. In *In re GM Trucks*, we observed that "[o]ne court has noted that the fee awards have ranged from nineteen percent to forty-five percent of the settlement fund." 55 F.3d 768, 822 (3d Cir. 1995) (citing *In re Smithkline Beckman Corp. Sec. Litig.*, 751 F. Supp. 525, 533 (E.D. Pa. 1990)). We also noted in *In re Prudential* that "[t]he district court . . .examined the fee awards in class actions with recoveries exceeding $100 million and found the fee percentages ranged from 4.1% to 17.92%." 148 F.3d 283, 339 (3d Cir. 1998).

However, recently two district courts in this Circuit have declined to follow this court's statement of the range in *In re Prudential*, stating that "the cases cited in [*In re Prudential*] were all decided at least thirteen years ago." *In re Ikon Office Solutions, Inc. Sec. Litig.*, 194 F.R.D. 166, 196 (E.D. Pa. 2000); *In re Orthopedic Bone Screw Prod. Liab. Litig.*, 2000 WL 1622741, at 7 (E.D. Pa. Oct. 23, 2000). Indeed, in another *Cendant* opinion dealing with attorneys' fees, this same District Court stated that, in cases surveyed by lead counsel, "[a]wards . . . ranged from a low of 20% in the case with a $200 million recovery to a high of 33.3% for cases with recoveries of $77.5 million and $110 million." *In re Cendant Corp. Sec. Litig.*, 109 F.Supp.2d 285, 290 (D.N.J. 2000). These varying ranges of attorneys' fees confirm that a district court may not rely on a formulaic application of the appropriate range in awarding fees

but must consider the relevant circumstances of the particular case.

One important consideration is the size of the settlement. The *Task Force Report* stated, with reference to fee awards in common fund cases: "The negotiated fee, and the procedure for arriving at it, should be left to the court's discretion. In most instances, it will involve a sliding scale dependent upon the ultimate recovery, the expectation being that, absent unusual circumstances, the percentage will decrease as the size of the fund increases." 108 F.R.D. 237, 256 (1985). We called attention to this statement in *In re Prudential*, explaining that "[t]he basis for this inverse relationship is the belief that `[i]n many instances the increase [in recovery] is merely a factor of the size of the class and has no direct relationship to the efforts of counsel.' " *In re Prudential*, 148 F.3d at 339 (quoting *In re First Fidelity Bancorporation Sec. Litig.*, 750 F . Supp. 160, 164 n.1 (D.N.J. 1990)). Accordingly, district courts setting attorneys' fees in cases involving large settlements must avoid basing their awards on percentages derived from cases where the settlement amounts were much smaller.

3. *Other Awards*

The District Court did not undertake to review the fees granted in other class action settlement cases, particularly in other large settlement cases, *i.e.*, cases in which the common fund exceeded $100 million.[19] Had it conducted such a review, the District Court should have looked specifically at cases in

---

[19] A district court in this Circuit noted that "[c]ourts have generally decreased the percentage awarded as the amount recovered increases, and $100 million seems to be the informal marker of a `very large' settlement." *In re Orthopedic Bone Screw Prod. Liab. Litig.*, 2000 WL 1622741, at 7 (E.D. Pa. Oct. 23, 2000).

which the percentage-of-recovery method, not the lodestar method, was employed to set the fee award, and it should have examined the reasoning behind the district courts' fee awards in cases of similar size.

Below, we have set forth a chart of fee awards given in federal courts since 1985[20] in class actions in which the settlement fund exceeded $100 million[21] and in which the percentage of recovery method was used.[22] We have outlined

---

[20] In 1984, the Supreme Court observed in *Blum v. Stenson* that "[in] the calculation of attorney's fees under the 'common fund doctrine,' . . . a reasonable fee is based on a percentage of the fund bestowed on the class." 465 U.S. 886, 900 n.16 (1984). Subsequently, the Third Circuit Task Force Report in 1985 outlined the problems with the lodestar method and recommended that courts use the percentage-of-recovery method instead of the lodestar method in common fund cases. After this instruction from the Supreme Court and the release of the Task Force Report, courts across the country regularly employed the percentage method to set fees in common fund cases.

[21] Although we have emphasized the seven-factor analysis required in class action fee cases set forth in *Gunter v. Ridgewood Energy Corp.*, 223 F.3d 190, 195 n.1 (3d Cir. 2000), Gunter is not listed in this chart because the settlement in that case was less than $100 million.

[22] In several cases, the class settlement exceeded $100 million but the lodestar method was used to determine attorneys' fees. *See, e.g.*, *McLendon v. Continental Group, Inc.*, 872 F. Supp. 142 (D.N.J. 1994) (settlement was for more than $400 million, and lodestar multiplier of 1.5 was used to award attorneys' fees); *In re Shell Oil Refinery Litig.*, 155 F.R.D. 552 (E.D. La. 1993) ($170 million settlement and $31.8 million in fees, which represented a 3.25 lodestar multiplier and approximately 18% of the total settlement); *In re Washington Public Power Supply Sys. Sec. Litig.*, 779 F. Supp. 1056 (D. Ariz. 1991) ($687 million settlement, $32 million in attorneys' fees, 1.2 lodestar multiplier, and attorneys' fees were 4.7% of total settlement); *In re Baldwin-United Corp. Litig.*, 1986 WL 12195 (S.D.N.Y. June 27, 1986) ($183.8 million settlement, $7.5 million in attorneys' fees, lodestar multiplier of 2, and fees were 4.1% of total

(continued...)

the amount of settlement, the percentage of the settlement that made up the attorneys' fee award and the lodestar multiplier.

(...continued)
settlement); *In re "Agent Orange" Prod. Liab. Litig.*, 611 F. Supp. 1296 (E.D.N.Y. 1985), *aff'd in part* 818 F.2d 226 (2d Cir. 1987) ($180 million settlement, $10.7 million in attorneys' fees, lodestar multiplier of 1.25 to 1.75, and fees were 6% of settlement). Additionally, it should be noted that the chart includes a substantial number of the post-1985 cases involving large settlements and fees granted as a percentage of the total settlement, but the chart is not comprehensive. We feel that the selection of cases in the chart are representative of the range of cases relevant to the District Court's analysis of Kirby's fee application in this case.

Case	Settlement	Fees as % of Recovery	Lodestar Multiplier
In re Cendant Corp. PRIDES Litig., 51 F. Supp. 2d 537 (D.N.J. 1999) The instant case under review here.	$341.5 million	5.7% ($19.3 mil.)	7-10
In re Cendant Corp. Litig., 109 F.Supp.2d 285 (D.N.J. 2000)	$3.16 billion	8.275% ($262 mil.)	32.7
In re Auction Houses Antitrust Litig., 2001 WL 170792 (S.D.N.Y. Feb. 22, 2001)	$512 million	5.2% ($27 mil.)	Inf. not available
In re Orthopedic Bone Screw Prod. Liab. Litig., 2000 WL 1622741 (E.D. Pa. Oct. 23, 2000)	$100 million	12%	Inf. not available

Case	Settlement	Fees as % of Recovery	Lodestar Multiplier
In re Prudential, 106 F.Supp.2d 721 (D.N.J. 2000)[23]	$1.8 billion	5% ($90 mil.)	2.13
In re Ikon Office Solutions, Inc. Sec. Litig., 194 F.R.D. 166 (E.D. Pa. 2000)	$111 million	30%	2.7
Shaw v. Toshiba America Inf. Sys., Inc., 91 F.Supp.2d 942 (E.D. Tex. 2000)	$2.1 billion	7% ($147 mil.)	Inf. not available
In re Sumitomo Copper Litig., 74 F.Supp.2d 393 (S.D.N.Y. 1999)	$116 million	27.5% ($32 mil.)	2.5

[23] The district court originally awarded attorneys' fees in this case in 1997, *see In re Prudential*, 962 F. Supp. 572 (D.N.J. 1997), which decision was vacated and remanded by the Third Circuit. *See In re Prudential*, 148 F.3d 283 (3d Cir . 1998). Those decisions are discussed *infra*.

Case	Settlement	Fees as % of Recovery	Lodestar Multiplier
Kurzweil v. Philip Morris Co., 1999 WL 1076105 (S.D.N.Y. Nov. 30, 1999)	$123.8 million	30% ($37.1 mil.)	2.46
In re Lease Oil Antitrust Litig., 186 F.R.D. 403 (S.D. Tex. 1999)	$190 million	25%	1.35
In re Copley Pharm., Inc., 1 F.Supp.2d 1407 (D. Wyo. 1998)	$150 million	13% ($19.5 mil.)	2
In re PaineWebber Ltd. P'ships Litig. , 999 F. Supp. 719 (S.D.N.Y. 1998)	$200 million	13% ($25.9 mil.)	1.4
Walco Investments, Inc. v. Thenen, 975 F. Supp. 1468 (S.D. Fla. 1997)	$141 million	15% ($21 mil.)	1.8
In re Combustion Inc., 968 F. Supp. 1116 (W.D. La. 1997)	$127 million	36%	2.99

Case	Settlement	Fees as % of Recovery	Lodestar Multiplier
Local 56, United Food & Commercial Workers v. Workers Union v. Campbell Soup Co., 954 F. Supp. 1000 (D.N.J. 1997)	$114.5 million	2.8% ($3 mil.)	2.39
Bowling v. Pfizer, Inc., 922 F. Supp. 1261 (S.D. Ohio 1996), aff'd 102 F.3d 777 (6th Cir. 1996)	$102.5 million	10% ($10.2 mil.)	Inf. not available
In re Domestic Air Transportation Antitrust Litig., 148 F.R.D. 297 (N.D. Ga. 1993)	$305 million	5.25% ($14.3 mil.)	Inf. not available
In re MGM Grand Hotel Fire Litig., 660 F. Supp. 522 (D. Nev. 1987)	$205 million	7%	1-2.95

In the charted cases, the attorneys' fee awards ranged from 2.8% to 36% of the total settlement fund. Looking at the percentage of recovery in this case (5.7%), it appears that it is in line with the other cases and even at the low end of the range. However, a brief review of the facts and posture of these other cases makes clear that, when examined through the seven-factor lens of *Gunter*, the higher fees awarded in the other cases were far more justified than the high award in this case. Accordingly, the District Court should have learned from those cases that extensive time and effort exerted by the attorneys and the existence of complex legal and factual issues warranted higher fee awards than the fee award that would have been appropriate for Kirby.

The district court in *In re Auction Houses* relied on a pre-settlement bidding process in awarding attorneys' fees. The bidding process in that case differed from the process employed by the District Court in this case, but it raised similar problems. However, regardless of the arguable flaws in the method by which the district court awarded fees in *In re Auction Houses*, that case was far more complex than the instant case and, as such, is distinguishable. Indeed, the comments of interim lead counsel, excerpted in the district court's opinion, are telling:

> Mr. Furth, on behalf of all of the interim lead counsel, said that he "never in [his] fondest dreams . . . believed that these defendants would pay $512 million" and that this settlement "is the most outstanding result I have ever heard of in the history of the antitrust laws." Another of the interim lead counsel noted that he and his colleagues had been negotiating with defendants prior to the appointment of plaintiffs' lead counsel, that they "had really good hard solid numbers from [defendants], and we didn't think

> we could have accomplished what Mr. Boies did."

In re Auction Houses Antitrust Litig., 2001 WL 170792, at 6 (S.D.N.Y. Feb. 22, 2001).

In *In re Orthopedic Bone Screw*, the district court described the case as "nothing less than an uninterrupted, hard-fought, `antagonistic' legal battle," in which the attorneys seeking fees had "conducted substantial, widespread and extensive discovery" including reviewing more than 1,500,000 pages of documents, and had "defended a variety of pleadings and discovery matters and `litigated a plethora of motions,' " which resulted in the court issuing nearly 2,000 Pretrial Orders. 2000 WL 1622741, at 6.

In *In re Ikon Office Solutions*, the district court granted the 30% fee request because, *inter alia*, "Counsel expended more than 45,000 hours on this case and paid out expenses of more than $3 million with no guarantee of recovery," the case presented "the legal obstacles of establishing scienter, damages, causation, and the like," and "derivative counsel fees will be taken from this amount." 194 F.R.D. at 194.

In *Shaw v. Toshiba*, the district court noted the protracted schedule of the case, because of which "it has been necessary to prosecute this action continuously, around the clock, seven days a week, workdays and holidays alike." 91 F.Supp.2d at 969. Other factors that made litigation of *Shaw* difficult included the two million pages of documents reviewed by class counsel, the fact that defendant's corporate headquarters were located in Tokyo, Japan, as well as the additional burden of having to translate many documents and much of the testimony from Japanese to English. Even with these numerous procedural difficulties, the district court only awarded 7% of the settlement in attorneys' fees.

The attorneys in *Sumitomo* spent more than 43,000 hours on the case and inspected 11 million pages of documents, and the case had legal and factual complexities including "the existence and analysis of the relationships between and among more than thirty Comex futures contracts, more than 500 LME contracts, literally hundreds of physical contracts, and millions of tons involved in the copper futures, the copper options and the copper derivative contracts." *Sumitomo*, 74 F .Supp.2d at 398.

In *Kurzweil*, the district court noted that, before the settlement, "[t]here had been no large settlements in tobacco litigation generally, and no successful action had yet been brought against a tobacco company based on allegations of addictiveness of nicotine." 1999 WL 1076105, at 1. In addition, the attorneys encountered several obstacles, including that the action was originally dismissed, and the attorneys reviewed millions of documents and tens of thousands of deposition and trial transcripts and conducted numerous depositions. 1999 WL 1076105, at 1.

In *In re Lease Oil*, the district court explained:

> As well as being novel, this litigation was highly complex and thus required a great deal of lawyering skill. As just explained, the task of simply compiling the evidence was an unusually difficult task, requiring the assistance of experts and the investment of many hours.[24] Also, being

---

[24] With respect to gathering evidence, the court asserted:

Godfrey and others had to create their own databases, compiling posted prices, NYMEX prices, transportation costs, grade and weight differentials and so forth simply to determine whether or not a cause of action might

(continued...)

> novel, the legal issues raised in the litigation required skilled attorneys to handle them.

186 F.R.D. at 445.

The district court in *Copley*, in granting the 13% fee award, observed that, "[d]uring expedited discovery, class counsel reviewed and analyzed more than 125,000 pages of documents and deposed roughly one hundred witnesses." 1 F.Supp.2d at 1408. The case also included 42 days of trial, and class counsel spent 48,794 hours on the case. Finally, the legal questions involved in *Copley* were both novel and complex. As the court explained: "not only was the certification of this class a complex question, but this was also the first and only mass tort class action to go to trial, and the case presented complex medical and scientific issues of causation." 1 F.Supp.2d at 1413.

PaineWebber too had many featur es that would dictate a high fee award. Class counsel conducted "extensive, coordinated discovery," including "coordinating discovery of hundreds of boxes of documents through the use of sophisticated computer databases, and deposing many key witnesses." 999 F. Supp. at 722. In more than two years of litigation, counsel spent "approximately 70,000 hours in heretofore uncompensated legal work in pursuit of factual investigation, drafting of documents, brief writing, document analysis, depositions, trial preparation, settlement negotiation and other tasks." 999 F. Supp. at 723. Finally, the legal issues in *PaineWebber* were complex, and class counsel "faced

---

(...continued)
exist. And, in order to first articulate their claims, class counsel had to hire experts to research their allegation that the NYMEX trading center method is a reasonable way of determining market price at the lease. *In re Lease Oil*, 186 F.R.D. at 445.

significant substantive and procedural defenses." 999 F. Supp. at 724.

Walco Investments was described by the district court as comprising "four years of bitterly-contested litigation." 975 F. Supp. at 1470. The case involved multiple defendants, and the claims were only loosely related, making class litigation exceedingly complicated, because "claims raised against each category of defendants presented separate issues of fact and law and involved differing theories of recovery." 975 F. Supp. at 1471. These circumstances encouraged the court to award 15% in attorneys' fees to attorneys from fourteen different firms representing class plaintiffs.

The action in *In re Combustion* was eleven years old at the time of settlement and the attorneys had spent over 50,000 hours on the case. In the litigation, there had been "roughly 160 complaints filed, 1140 answers, 1922 motions, with almost 1000 memoranda in support of or in opposition to these motions, 285 depositions . . . , 90 hearings, at least one oral argument per month since the case was removed to federal court, and endless numbers of settlement conferences," as well as "three fairness hearings, the first one lasting one week, and the other two lasting approximately one day each" and "one *Daubert* hearing lasting a total of two weeks." *In re Combustion*, 968 F. Supp. at 1136.

In *Local 56*, the court acknowledged "the complexity of the issues in this case, the significant attendant risks of proceeding with litigation, and the tenacity and vigor with which all counsel represented their clients' interests," in this class action which lasted for four years. 954 F. Supp. at 1005. Even so, class counsel's fees amounted to only 2.8% of the total settlement, a far smaller percentage than the fee awarded to Kirby by the District Court.

In *Bowling*, the district court averred that "[t]he Court's choice of a percentage . . . will be heavily informed by the value of the services rendered by Counsel." 922 F. Supp. at 1280. The court observed that "Counsel were confronted with myriad complex legal and factual questions in bringing this action and in negotiating the settlement." 922 F. Supp. at 1280.

Domestic Air involved a class action against several airline companies claiming a conspiracy to fix prices. The court observed:

> Counsel negotiated a significant settlement for the class in light of the precarious financial position of most of the defendants and over defendants' insistence that they could not provide a larger cash settlement. Were it not for the considerable skill and effort of plaintiffs' counsel, the action would never have been certified as a class action and members of the class would receive nothing in return for their claims against defendants.

148 F.R.D. 297, 351-52 (N.D. Ga. 1993). In other words, the action in *Domestic Air* involved fundamental procedural obstacles that could easily have resulted in no recovery at all. Accordingly, class counsel was rewarded significantly for negotiating such a large settlement.

Finally, in *In re MGM Grand Hotel*, the court considered "the particular and unique circumstances of this case," including the fact that the attorneys had recovered over 6,000 objects from the fire site and had conducted over 1,400 depositions, in granting the 7% fee award. 660 F. Supp. at 526.

Indeed, in case after case, the same factors recur: complex and/or novel legal issues, extensive discovery,

acrimonious litigation, and tens of thousands of hours spent on the case by class counsel. Because none of these factors which increase the complexity of class litigation was present here, it makes sense that the fee awarded in this case should be far lower than those awarded in the charted cases, which fees ranged from 2.8% to 36% of the total settlement.

Also relevant to the District Court's analysis in this case is our holding in *In re Prudential* remanding the case to the district court. In that case, we rejected an award of 6.7% of the settlement fund in a case with a fund of $1 billion to $2 billion because the district court had failed to explain adequately why it had applied such a high percentage to the settlement figure and because the court had not explained why the 5.1 lodestar multiplier was justified. We also warned in *In re Prudential* against overemphasizing counsel's role in recovery, in the context of our criticism of the district court's assumption that counsel had been a catalyst for a plan authored by the Multi-State Life Insurance Task Force, which facilitated the class action settlement in that it established Prudential's liability. We explained that "[a]llowing private counsel to receive fees based on the benefits created by public agencies would undermine the equitable principles which underlie the concept of the common fund, and would create an incentive for plaintiffs attorneys to `minimize the costs of failure . . . by free riding on the monitoring efforts of others.' " *In re Prudential*, 148 F.3d at 337. Similarly, as we have consistently observed, Cendant's liability and consequent collectability had been conceded at the outset of the PRIDES controversy, and that fact should have been given major consideration by the District Court when setting Kirby's attorneys' fees.

Our review of the lack of complexity of this case and of awards in other large class action settlements, all of which involved more complex issues, more time invested by the attorneys, and, with only a few exceptions, smaller total

settlements, leads us to the conclusion that the District Court abused its discretion in granting a 5.7% attorneys' fee award in this case.[25]

4. *Checking Against Lodestar*

The District Court's abuse of discretion in this case is magnified when one looks at the lodestar multiplier. As we stated above, "we have . . . suggested that district courts cross-check the percentage award at which they arrive against the `lodestar' award method." *Gunter v. Ridgewood Energy Corp.*, 223 F.3d 190, 195 n.1 (3d Cir. 2000); *see also In re Prudential*, 148 F.3d at 333 (stating that "'it is sensible for a court to use a second method of fee approval to cross check' its initial fee calculation"). Even when the lodestar method is used only as a cross-check,"courts must take care to explain how the application of a multiplier is justified by the facts of a particular case."[26] *In re Prudential*, 148 F.3d at 340-41.

In this case, the lodestar multiplier is 7 at a minimum (using Kirby's senior partner rate as the rate for all hours), and

---

[25] We should note that the award actually amounted to more than 5.7% of the total recovery. The fund had a value of $341.5 million, but any unclaimed portion of the fund returned to Cendant. As of August 1999, only 22,502,782 Rights, with a monetary value of $263.5 million, were claimed. Taking this amount as the total recovery, Kirby's attorneys' fees constituted 7.3% of the total fund.

[26] We observed in *In re GM Trucks* that "[t]he Supreme Court . . . has rejected the use of multipliers to enhance the lodestar's hourly rate amount." 55 F.3d 768, 822 (3d Cir. 1995) (citing *City of Burlington v. Dague*, 505 U.S. 557 (1992)). However, as stated above, calculation of the lodestar multiplier is still appropriate when used to cross-check the reasonableness of a percentage-of-recovery fee award.

the Trust calculates the lodestar multiplier as 10.[27] Either of these multipliers (Kirby's multiplier of 7 or the Trust's multiplier of 10) is substantially higher than any of the multipliers in the cases charted above, which range from 1.35 to 2.99, and is also significantly higher than the "large" 5.1 multiplier in *In re Prudential*, which we questioned because "the court offer[ed] little explanation as to why a multiplier was necessary or appropriate." 148 F.3d at 340-41. In allowing such a high multiplier in this case without even calculating it, much less explaining how it is justified, the District Court strayed from all responsible discretionary parameters in the awarding of Kirby's attorneys' fees.

In all the cases in which high percentages were applied to arrive at attorneys' fees, the courts explained the extensive amount of work that the attorneys had put into the case, and appropriately the lodestar multiplier in those cases never exceeded 2.99. This range is consistent with the principle that " `[m]ultiples ranging from one to four are frequently awarded in common fund cases when the lodestar method is applied.' " *In re Prudential*, 148 F.3d 283, 341 (3d Cir. 1998) (quoting 3 Herbert Newberg & Alba Conte, Newberg on Class Actions, S 14.03 at 14-5 (3d ed. 1992)). In this case, the District Court judge made clear that he wanted to reward Kirby for Kirby's quick and beneficial settlement of the case, and that may be a good reason for the fee award to exceed the lodestar, but not to the exclusion of all other factors. On remand of this case to the District Court, we strongly suggest that a lodestar multiplier of 3 (the highest multiplier of the cases reviewed above) is the appropriate ceiling for a fee award, although a lower multiplier may be applied in the District Court's discretion. The 3

---

[27] The Trust calculates the lodestar multiplier as 10 because it assesses the appropriate lodestar fee as $1.9 million, 1/10 of the $19.3 million awarded. (*See* Trust's Brief at 25-26.)

multiplier would result in an award of no more than $8.3 million for Kirby (calculating the lodestar at $495/hour).

5.

We are seriously troubled by the District Court's award of attorneys' fees constituting 5.7% to 7.3% of the total settlement. As discussed above, this case was neither legally nor factually complex and did not require significant motion practice or discovery by Kirby, and the entire duration of the case from the filing of the Amended Complaint to the submission of a Settlement Agreement to the District Court was only four months. Other cases in which higher percentages were awarded are so dissimilar factually and legally from this case that they cannot be relied upon to support the 5.7% award made in this case. In addition, our discussion and holding in *In re Prudential* requires a holding here that the District Court's award was an abuse of its discretion, particularly where the District Court appeared to be attributing more responsibility to Kirby for the quality of the settlement than may legitimately be warranted. Accordingly, we will vacate the District Court's fee award to Kirby and remand the issue of Kirby's attorneys' fees to the District Court for a more thorough and thoughtful evaluation, including an analysis of, and compliance with, the factors enunciated by us in *Gunter* and in this opinion.

III.

Finally, the Trust argues that the District Court erred in not granting attorneys' fees to the Trust's attorneys for suggesting a bidding process to choose Lead Counsel and for objecting to Lead Counsel's fee application.

The Second Circuit stated in *White v. Auerbach*:

> it is well settled that objectors have a valuable and important role to perform in preventing collusive or otherwise unfavorable settlements, and that, as the district court recognized, they are entitled to an allowance as compensation for attorneys' fees and expenses where a proper showing has been made that the settlement was improved as a result of their efforts.
>
> Ordinarily the trial judge has broad discretion in deciding whether, and in what amount, attorneys' fees should be awarded, since he is in the best position to determine whether the participation of objectors assisted the court and enhanced the recovery.

500 F.2d 822, 828 (2d Cir. 1974).

In this case, the District Court judge exercised his "broad discretion" in finding that the Trust's attorneys had not made the "proper showing . . . that the settlement was improved as a result of their efforts." The District Court judge made clear that he had considered the idea of a bidding process before the Trust's attorneys suggested that procedure, stating: "Walker's opinions have been out there since 1993 at least[28] . . . Why do you think that the door was only opened by your key?" (JA 766.) He also asserted that "my last year's clerk and I actually had brooded this idea of an auction long before you came down the pike." (JA767.)

---

[28] Judge Vaughn Walker actually implemented the bidding process in *In re Oracle Sec. Litig.* in 1990. 131 F.R.D. 688 (N.D. Cal. 1990). Judge Walker's process differed significantly from the bidding process here in that it was not a *sealed*-bid process.

With respect to the Trust's claim that its attorneys' objections to the fee application resulted in a reduction of the fee award from $34.15 million to approximately $19 million, the District Court gave no indication that the objections were the reason for the reduction and even stated, "if I find that what Mr. Kirby wants is excessive, I'm not dependent upon you . . ." (JA765.) Hence, because the Trust had not demonstrated that it had been responsible for the procedure utilized by the District Court or that its actions had resulted in a reduction of Kirby's fees from $34 million to $19 million--findings which are not clearly erroneous--we will sustain the District Court in its rulings on these points.

However, our review of the District Court's attorneys' fee award to Kirby would not have come about had it not been for the Trust's appeal. As the Ninth Circuit observed in *Zucker v. Occidental Petroleum Corp.*, to which we have earlier adverted, "[t]he contribution [a particular class member's] attorney made, by providing an adversarial context in which the district court could evaluate the fairness of attorneys' fees, was substantial." 192 F.3d 1323, 1329 (9th Cir. 1999).

Recognizing this fact, that it was the Trust which called our attention to the many aspects of Kirby's fee award which we have discussed and which we have found requires reconsideration by the District Court, we would be remiss if we did not acknowledge this benefit[29] and remand the Trust's claims for its own attorneys' fees to the District Court for reconsideration together with Kirby's fee application. Of course, this will require the necessary submissions by the Trust's attorneys to comply with normal fee procedures. Under these circumstances, we think it appropriate for the District Court to

---

[29] It bears mention that the Trust's appellate brief urged that Kirby's fees be reduced from $19 million to $7.6 million, (*see* Appellant's Brief, at 30), a similar figure to the one at which we arrived independently.

evaluate the value of the benefit of the Trust's contribution to the ultimate fee (to be decided by the District Court on remand) and to compensate the Trust to that extent.[30]

In so holding, we are fully aware that Cendant had agreed not to contest the award of fees as part of its settlement agreement. We also acknowledge that the return to Cendant of any unclaimed rights may well enhance the value of Cendant's rights to its shareholders and rights beneficiaries.

IV.

Although we will not disturb the settlement itself which has not been challenged on appeal, we will vacate the award of attorneys' fees to Kirby and remand this case to the District Court for a reevaluation of the amount of attorneys' fees, both because the District Court did not adequately explain its reason for the fee award and because the fee award does not comply with the requirements of our jurisprudence. We will also vacate the District Court's order denying attorneys' fees to the Trust and remand for reconsideration in light of the foregoing discussion and opinion.

A True Copy:

---

[30] In its appellate brief, Kirby suggests that the Trust may not have standing to appeal the District Court's denial of the fee request because it was the Trust's counsel, not the Trust itself, that made that request in the District Court. This jurisdictional argument, though not without merit, need not concern us for two reasons. First, the District Court's decision denying fees to the Trust's counsel stands insofar as it related to the argument raised by counsel before the District Court. We remand the issue of the Trust's counsel's fee request to the District Court only with respect to the Trust's effect on the settlement through this appeal. Second, we have repeatedly emphasized in this opinion the importance of the court's role in reviewing counsel's fees in class actions, and we believe this role extends to the District Court hearing a fee application by the Trust's counsel at this point.

Teste:

Clerk of the United States Court of Appeals for the Third Circuit

Filed June 16, 1999

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

IN RE	: Civ. No. 98-2819
CENDANT CORPORATION	: (WHW)
PRIDES LITIGATION	:
	:AMENDED OPINION

WALLS, District Judge.

This matter is before the Court on the application of Roger W. Kirby of Kirby, McInerney & Squire, LLP, Lead Counsel for the Prides class ("Lead Counsel"), for approval of the proposed settlement with Cendant Corp. and for attorneys' fees and reimbursement of expenses. Howard B. Sirota, counsel for the Joanne A. Aboff Family Trust U/A dated 2/11/92 ("Aboff Family Trust"), has objected to Lead Counsel's fee request on the ground that it is excessive. Previously, counsel for the Aboff Family Trust had objected to the settlement on the basis of a confidential supplemental agreement incorporated in the settlement, but this objection has been withdrawn. On May 18, 1999, the Court heard oral argument of these matters. The Court also raised, *sua sponte*, the application of counsel for the Aboff Family Trust for attorneys' fees. The settlement is approved subject to the modifications to attorneys' fees described herein. The application of counsel for the Aboff Family Trust for attorneys' fees is denied.

BACKGROUND

Cendant was formed on December 17, 1997, through the merger of CUC International, Inc. ("CUC") and HFS, Inc. ("HFS"). In February, 1998, Cendant and its wholly owned subsidiary, Cendant Capital I, issued a derivative-type convertible security known as Cendant FELINE PRIDES ("Prides") in an initial public offering ("Prides Offering") pursuant to a registration statement, a prospectus, and a prospectus supplement filed with the Securities Exchange Commission ("SEC"). The registration statement and the prospectus contained Cendant's audited and consolidated statements of income for the three years ended December 31, 1996 and the Company's unaudited financial results for 1997. The Prides Offering, which involved the sale of approximately 29,900,000 Prides valued at $1.5 billion, closed on March 2, 1998. Defendants Merrill Lynch & Co., Merrill Lynch, Pierce, Fenner & Smith Inc. (collectively "Merrill Lynch"), and Chase Securities Inc. ("Chase") were the underwriters.

The registration statement and the prospectus offered two types of Prides: Income Prides and Growth Prides. Each of the Income Prides consists of a unit comprised of a Purchase Contract under which the holder will purchase from Cendant on February 16, 2001 a specified number of newly issued shares of Cendant common stock for $50 (the "Stated Amount") in cash. Cendant will pay the holders of Income Prides "Contract Adjustment Payments" at the rate of 5% the Stated Amount per year, an interest in Trust Preferred Securities paying 6.45% of the Stated Amount per year, and $50 at maturity. Each of the Growth Prides consists of a unit comprised of a Purchase Contract under which the holder will purchase from Cendant on February 16, 2001 a specified number of newly issued shares of Cendant common stock for the Stated Amount in cash. Cendant will pay the holders of Growth Prides "Contract Adjustment Payments" at the rate of 5% of the Stated Amount per year and

a 1/20th undivided beneficial interest in a treasury security having a principal amount of $1000 and maturing in 2001.

On April 15, 1998, Cendant announced that it had discovered accounting irregularities in a former CUC business unit and that Cendant's financial statements for 1997, and possibly earlier years, would be restated. Thereafter, a number of purchasers of Prides as well as other Cendant securities filed class actions against Cendant and other defendants including Merrill Lynch. On May 29, 1998, this Court consolidated all of the actions then pending against Cendant under In re Cendant Corporation Litigation, Civ. 98-1664 (WHW). On June 15, 1998, another class action was brought on behalf of the purchasers of Prides, Welch & Forbes, Inc. v. Cendant Corporation, et al. Civ. No. 98- 2819 (WHW), which was also consolidated with the 98-1664 action. In its Opinion and Order of September 8, 1998, this Court appointed Welch & Forbes lead plaintiff for all claims based on purchases of Prides in the In re Cendant Corporation Litigation action. See In re Cendant Corp. Litig., 182 F.R.D. 144 (D. N. J.1998).

By that Opinion, this Court announced the procedure it would use to select the lead counsel to represent the plaintiff class. The Private Securities Litigation Reform Act ("PSLRA"), 15 U.S.C. § 77z-1, et al., attempts to protect the plaintiff class and ensure that the total attorneys fees and expenses awarded by a court to counsel for the plaintiff class shall not exceed a reasonable percentage of the amount of any damages and prejudgment interest actually paid to the class. 15 U.S.C. § 77z-1(a)(6). To implement the objectives of the PSLRA, this Court determined that the selection of counsel should be the subject of competitive, adversarial bidding. In re Cendant Corp. Litig., 182 F.R.D. 144 (D.N.J.1998).

The Court invited any attorney who wanted to be lead counsel for either the Prides class or the class of shareholders

excluding the Prides-holders to submit a sealed bid to the Court. A number of attorneys and law firms submitted bids which, among other requirements, contained their professional qualifications and their ability to undertake and maintain all costs of the litigation. The Court reserved the right to reject any bid which it deemed not to have been made in good faith or which was contrary to the interests of either plaintiff class. Id. Recognizing that the PSLRA gives the lead plaintiffs the statutory opportunity to choose their counsel, subject to the approval of the Court, the Court gave lead plaintiffs' original counsel the right of first refusal: if the plaintiffs' original counsel was qualified and had not submitted the lowest qualified bid, it was given the opportunity to agree to the terms of what the Court had found to be the lowest qualified bid. Kirby, McInerney & Squire, LLP (the "Kirby firm"), the original counsel for Welch & Forbes, lead plaintiff for the Prides class, exercised that right, and on October 7, 1998, accepted the terms and fee bid schedule of the lowest qualified bid to represent the Prides class. On October 8, 1998, the Court appointed the Kirby firm as Lead Counsel for the Prides class.

On November 11, 1998, lead plaintiff for the Prides class filed an Amended and Consolidated Class Action Complaint ("Amended Complaint") against Cendant, Cendant Capital I, officers and directors of Cendant (including former directors of HFS and CUC), Ernst & Young (CUC's independent auditor from 1983 through early 1998), Merrill Lynch, and Chase. That Complaint alleged that the registration statement and prospectus for the Prides Offering contained materially false and misleading statements and that Cendant made other misstatements and omissions of material fact on and after April 15, 1998. Claims arising under Sections 11, 12(a)(2), and 15 of the Securities Act of 1933 were asserted on behalf of a class of purchasers or acquirers of Prides from February 24, 1998 through April 15, 1998, together with claims under Sections 10(b) and 20(a) of the Securities Exchange Act of

1934 on behalf of those persons who purchased or acquired Prides from April 16, 1998 through July 15, 1998.

With the Amended Complaint, lead plaintiff filed a motion for certification of a class of those persons who purchased or acquired Prides from February 24, 1998 through April 15, 1998 with claims under the Securities Act of 1933, a motion for summary judgment against Cendant under § 11 of the Securities Act of 1933, and a motion for preliminary injunctive relief to require Cendant to place $300 million in trust pending resolution of those claims. The Court de-consolidated this action and styled its caption In re Cendant Corporation Prides Litigation, Civ. No. 98-2819. Before the motions for class certification, summary judgment, and injunctive relief were adjudicated, the parties announced that they had reached an agreement in principal on January 7, 1999. A proposed settlement agreement was presented to the Court on March 17, 1999.

The settlement agreement is between and among the plaintiffs (the class of persons who purchased Income or Growth Prides during the period February 24, 1998 through April 15, 1998) and the defendants Cendant Corp., Cendant Capital I, Merrill Lynch, and Chase. Under it, Cendant has agreed to issue to each authorized claimant one Right in respect of each Prides that was beneficially held by such claimant at the close of business on April 15, 1998 and with respect to which a timely and valid proof of claim has been filed. Rights will be issued to an authorized claimant regardless whether that claimant continues to hold Prides. Cendant will issue two New Income Prides or two New Growth Prides to any person who delivers to Cendant three Rights, together with two existing Income or Growth Prides, respectively, before the expiration date. The expiration date will be the close of business on February 14, 2001, unless the Prides are amended. The New Income and Growth Prides will have the same terms as the

existing Income and Growth Prides, respectively, except that the Settlement Rate shall be modified such that the value of each of the New Prides will exceed the value of each of the existing Prides by $17.57, subject to adjustment in the event that individual claims must be reduced to pay counsel fees: each Right has a stated or theoretical value of $11.71 (2/3 of $17.57). Although defendant Merrill Lynch held 738,526 Prides at the close of business on April 15, 1998, it is not a member of the class and it is not entitled to receive any Rights. Defendants who held Prides at the close of business on April 15, 1998 are excluded from the class of authorized claimants. The parties have agreed that the total theoretical value of Rights available to satisfy the claims of the eligible members of the class, fees of Lead Counsel, and litigation expenses is approximately $341,480,861 (29,161,474 Rights x $11.71).

Plaintiffs agreed to dismiss with prejudice any claims arising under the Securities Act of 1933, based upon any purchase of Prides on or before April 15, 1998. Claims in the Complaint from the purchase of Prides on or after April 16, 1998 are not settled or released. Plaintiffs have also released Merrill Lynch and Chase from liability for any conduct, including theoretical valuation and pricing of the Rights, performed pursuant to the settlement.

Now, Lead Counsel seeks fees not in cash but in the same Rights granted to the class. The Kirby firm seeks a fee of 2,916,147 Rights with a limit that no more than 2,043,303 come from the class itself. The theoretical value of these Rights is approximately $34,148,081. Lead Counsel argues that most, if not all, of its fee will come from unclaimed Rights. Because Merrill Lynch is not entitled to receive any rights, Lead Counsel could receive the 738,526 Rights which represent Merrill's Prides. Lead Counsel maintains that its fee request is reasonable because the Court should take into account that it achieved a full recovery, in aggregate, for class members for

their 1933 Act losses in less than two years, that its approach was novel, that it seeks fees in Rights rather than cash, which bears risk to it. According to Lead Counsel, the proposed fee will come at little or no expense to the class; the class will be charged less than it would be under the bid.

Counsel for the Aboff Family Trust has objected to Lead Counsel's fee request on the basis that it is excessive. Counsel contends that if the Court awards Lead Counsel less fees than it now requests, then the remaining Rights should be distributed to participating class members pursuant to a Court order increasing the theoretical value of the Rights to be distributed under the settlement. Cendant opposes this proposal because "it would radically alter a provision of the settlement stipulation for which Cendant bargained and which is a valuable component of the deal from Cendant's perspective." (Cendant's Br. in Opp. at 4-5.) Cendant argues that "[u]nder the settlement, any undistributed Rights after Rights are distributed to class members who submit timely and valid proofs of claim and to Lead Counsel in satisfaction of court awarded fees and expenses, would be canceled. In other words, the future equity in Cendant represented by such undistributed Rights would continue to belong to Cendant and its current stockholders." (Id. at 5.) Cendant contends that it bargained for such a settlement and should not be deprived of its contractual right to cancel any unclaimed Rights.

DISCUSSION

A. Approval of the Settlement

The Court considers the settlement to be eminently fair and reasonable. The class is made completely whole by such compensation. There are no objections voiced to the

settlement-only to the request for attorney fees. The proposed settlement is approved subject to the following modifications to the attorneys' fees.

B. Lead Counsel's Application for Attorneys' Fees

The fee determination rests upon two basic considerations of Congress which motivated its passage of the PSLRA, 15 U.S.C. § 77z-1, et al. They are the need for the reasonable cost of quality legal representation of the plaintiff class and the accompanying desire to prevent, if possible, a defendant corporation from becoming moribund as a result of litigation and its costs. To implement the objectives of the PSLRA, the Court employed the use of competitive, adversarial bidding in its approval of lead counsel.

This stage of the litigation, notwithstanding that Lead Counsel has moved for summary judgment, is what would be normally the discovery period, very early on in the litigation. The Court considers Cendant's acknowledgment of liability in its April 15, 1998 news conference and the acceptance by Lead Counsel of the terms of the lowest qualified bid. The Court appreciates Lead Counsel's verve and the eminently satisfactory results it obtained for the class. There are no objections to the settlement agreement.

Lead Counsel argues that its request for fees will not impair the class's Rights because they will come from unclaimed Rights. That argument is speculative. The amount of unclaimed Rights cannot be determined at this time because it is a future contingency. (And we have no data to form a reasonable projection of what may be.) In the event that unclaimed Rights do not satisfy Lead Counsel's requested fees, any deficit would have to be assessed to the class.

Yet Lead Counsel bargained for the right to represent the class by the October 7, 1998 acceptance of the lowest qualified bid percentage, a percentage which would obligate the class to its Lead Counsel less than the now requested fees. Apropos the auction and resulting bid, the Court promised that such bid would serve "as a benchmark of reasonableness," 182 F.R.D. at 152, to enable "a thorough judicial review of fee applications ... required in all class action settlements." In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768, 819 (3d Cir.1995). This Court has examined the time expended by Lead Counsel and the regular hourly rates of its services. Lead Counsel, through its principal partners, associates, and paralegals expended approximately 5,600 hours, and its senior partners have a regular hourly rate of $495. This represents significant effort. But the Court is more impressed by the quality of result than the quantity of effort. The class will receive its full entitlement. And resolution of this matter was greatly accelerated by the creative dynamism of counsel. For this, counsel should not be penalized by a slavish application of the lodestar. We have seen the gifted execution of responsibilities by a lead counsel.

As said, the total theoretical value of Rights available to claims of the class, fees and expenses of Lead Counsel is $341,480,861. The Court finds the expenses of $2,367,493 were reasonable and necessary to the prosecution of this litigation. That amount, in equivalent Rights (202,177), shall be deducted from the gross $341,480,861 (29,161,474 Rights) and issued to Lead Counsel.

The balance of $339,113,368 (28,959,297 Rights) shall be subject to counsel fees. The Court determines that counsel fees of 5.7% of this net balance are reasonable. Lead Counsel shall receive that number of Rights (1,650,680) equivalent to 5.7% of 28,959,297 Rights, approximately $19,329,463.

The Court directs Lead Counsel to seek to satisfy payment of these awards of expenses and fees first from any unclaimed Rights. Then, and only then, to the extent that such fees and expenses have not been satisfied by unclaimed Rights, shall any deficiency be assessed against and borne by the class.

Any Rights unclaimed after authorized class claimants and Lead Counsel have been issued their entitled Rights shall be canceled by Cendant Corporation. The Court cannot modify the express terms of the settlement negotiated by the parties. Each is entitled to the fullness of its bargain obtained.

CONCLUSION

The proposed settlement is approved subject to the above modifications to attorneys' fees. The application of counsel for the Aboff Family Trust for attorneys' fees is denied for the reasons expressed during the waste of the Court's time at oral argument.

SO ORDERED:

William H. Walls, U.S.D.J.

15 June 1999
Dated

Filed April 25, 2001

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Case No. 99-5555

IN RE: CENDANT CORPORATION PRIDES
LITIGATION

WELCH & FORBES, INC., an institutional
investment manager, individually and on behalf
behalf of all others similarly situated

v.

CENDANT CORPORATION; MERRILL LYNCH & CO.;
CHASE SECURITIES, INC.; HENRY R. SILVERMAN;
WALTER A. FORBES; COSMO CORIGLIANO;

Joanne A. Aboff Family Trust,
Appellant

(D.C. Civ. No. 98-cv-02819)

SUR PETITION FOR HEARING

Present: BECKER, Chief Judge,
SLOVITER, MANSMANN, SCIRICA, NYGAARD, ROTH,
BARRY, FUENTES and GARTH*, Circuit Judges

---

*As to panel rehearing only.

The petition for rehearing filed by the PRIDES class-appellee in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied.

BY THE COURT,

/s/_____
Circuit Judge

Dated: April 25, 2001